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## THE INCIDENCE OF RENT.

ALL who read Professor Langdell's article on Real Obligations, published in June last in the pages of this REVIEW,<sup>1</sup> must have been vividly impressed by his brilliant summary of the law of rent. Especially, I think, must this have been the case with his English readers; for in this country, owing to the great depression which has taken place of late years in the value of agricultural land, the liability of landowners to pay rents charged on their lands has become a very serious burden, and owners of rent charges have in several recent cases been driven to assert their remedy by action. I think that a short account of the decisions in these cases may be of interest to the American readers of this REVIEW; especially as I gather, from Professor Langdell's omission to mention them, that they are not recognized as authorities in any of the United States. At the same time I will venture, though with much diffidence, respectfully to make a criticism upon Professor Langdell's theory of the nature of the rent.

To commence with my criticism. Professor Langdell says:<sup>2</sup> "There are in English law two real obligations in particular, which are always principal obligations, namely, rent and predial tithe. In each of these the property bound is land; and yet in each it is not the *corpus* of the land, but its fruits, or the income produced by it, that is bound. Each, therefore, according to the nomenclature of the law of Scotland, is a *debitum fructuum*, not a *debitum*

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<sup>1</sup> Vol. X. p. 71.

<sup>2</sup> 10 HARVARD LAW REVIEW, 78.

*fundi*. Hence each is payable periodically ; and hence also, *when a payment becomes due, it becomes a personal obligation of the occupier of the land*,<sup>1</sup> who has received the fruits out of which the rent or tithe in question was payable." Again he lays down<sup>2</sup> "that the owner of a rent of any kind is entitled to have the same paid, *if the income of the land out of which it issues is sufficient to pay it*,<sup>3</sup> and that it does not lie in the mouth of the tenant of the land to say that the income is insufficient." And further on, he criticises the decision in *Cupit v. Jackson*<sup>4</sup> that a court of equity has jurisdiction to decree that arrears of rent shall be raised by sale or mortgage of the land charged therewith, on the ground that a rent is not in its nature a charge upon the *corpus* of the land out of which it issues, but merely upon its fruits and income ; and when a court of equity gives relief upon the foundation of a legal right, it cannot extend its relief beyond the legal right. Lastly, in discussing the liability of a landowner to be made personally liable in equity to pay a rent charged on his land,<sup>5</sup> Professor Langdell asserts that, if his liability be only by reason of his being the assignee of the term on the creation of which the rent was reserved, *or the grantee of the estate out of which the rent was granted, his liability will begin only when the assignment or grant was made to him*,<sup>6</sup> and will continue only so long as the term or estate remains vested in him.

Now I fully understand that professor Langdell's object was, not to enter into the history of rent, but merely to give a brief summary of the law of rent as applicable at the present day in those States of the Union where the law is founded upon the principles of English common law and equity. And in so far as his article is to be regarded as a statement of the law now obtaining in those States, it would be the greatest impertinence for me to take exception to anything he has said. When I learn from his article, for instance,<sup>7</sup> that in some States the law of distress for rent has never been adopted, and that in Pennsylvania the statute of *Quia Emptores* has never been in force, I recognize at once that "most excellent differences" have arisen between the laws of England and the United States as regards land and rent, and I accept his exposition of the laws of the Union with the faith due to an

<sup>1</sup> The Italics are mine.

<sup>2</sup> 10 HARVARD LAW REVIEW, 94.

<sup>3</sup> The Italics are mine.

<sup>4</sup> 13 Price, 74.

<sup>5</sup> 10 HARVARD LAW REVIEW, 94.

<sup>6</sup> The Italics are mine.

<sup>7</sup> 10 HARVARD LAW REVIEW, 84, 88.



expert. But after all, in the passages I have quoted, the writer professes to summarize the principles of the common law, without giving any hint that, in respect to rent, the common law obtaining in the United States is different from the common law of England. If, therefore, (and I say if, for Touchstone's<sup>1</sup> reasons, though indeed I have no fear that an interest in the principles of our common law could be anything but a link of friendship between my American legal brethren and myself,) — if, I say, Professor Langdell meant to state the common law as obtaining in England, I will venture to break a lance with him, and to maintain that by the common law of England rent is regarded as a charge upon the land out of which it issues, and not upon the income or profits of the land.

In support of this proposition, I would point out, first, that all rent is modelled upon rent service, of which rents charged and rents seck were but a more or less perfect imitation; and that the perfect type of rent is, not the rent service reserved upon a lease for years, but that reserved under the old common law before the statute of *Quia Emptores*, upon the grant of a fee. Now rent service of this kind is but one of the many services which were the incidents of feudal tenure, and such services were a burden on the tenement into whosoever hands it might come. The common law view is that the land granted in fee is bound to render the services by which it is held,<sup>2</sup> through the hand of the terre-tenant for the time being; and to enforce this obligation (which, I entirely agree, is a real obligation) the law gave to the lord, to whom the services were due, the remedy of distress, that is, of seizing the chattels found on the tenement, not to satisfy the services, but in order to exact their performance.<sup>3</sup> The purely coercive nature of distress for rent service at common law is shown by the fact that the chattels distrained could not be sold to satisfy the amount due, nor used, nor kept for use; they could only be detained as a pledge

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<sup>1</sup> I allude to Shakespeare's, not Sheppard's Touchstone.

<sup>2</sup> See Bac. Abr., Rent (K 2).

<sup>3</sup> It is well shown how service due from a tenant to his lord was "a burden on the tenement, a service due from the tenement" in Pollock and Maitland, Hist. Eng. Law, I. 215 *seq.* When we find that it might be said that hides and virgates must send men to the war, reap and mow, do suit of court, or carry the King's writs whenever they come into the county, we see plainly that it was well understood that services were a charge on the land. The lord's remedies by distress and otherwise for enforcing his services are also carefully explained in the same work, I. 333-335, II. 124 *seq.*, 573-576. The nature of rents is examined, II. 128 *seq.*, where they are described as being charged on the land out of which they issue.

for payment. The whole object of distress was to realize *specifically* the services charged on the land. In the case of rent service, it was a process to make the land pay the rent due therefrom, payment being necessarily by the tenant's hand. Distress was never a means of exacting *compensation* for failure to render the services charged on the land until the statute 2 Will. & Mary, c. 5, altered the whole character of the remedy by enabling the chattels distrained to be sold, and the amount of rent due to be paid out of the proceeds of sale.<sup>1</sup> The common law never gave any process to recover rent out of the income or profits of the land, out of which the rent issued. Indeed, as at common law, "nothing shall be distrained for rent that cannot be rendered again in as good plight as it was at the time of the distress taken,"<sup>2</sup> the fruits of the land, such as growing crops, corn in sheaves, hay in cocks, and fruit, were originally privileged from distress.<sup>3</sup> Would not this be strange if rent were a *debitum fructuum*?

I submit that the following considerations also show that rent is a charge on the land, out of which it issues:—First, at common law, *all* chattels found on the land, no matter whose they were, might as a rule be distrained for rent. Secondly, in the case of a rent in fee, the common law imposed no duty of payment upon the terre-tenant. It was no injury to the rent owner that the tenant appropriated the whole of the rents and profits to his own use; and mere nonpayment by him of the rent was not an actionable wrong. Thirdly, any tenant of land, out of which a rent service or rent charge issued, might always be distrained to pay all arrears of the rent, whether accrued due during his tenancy *or before it*. Fourthly, in a writ of entry to recover a freehold rent the whole of the arrears might be recovered against the tenant of the land, out of which the rent issued, not only the arrears accrued during his tenancy, but also those previously accrued. And fifthly, in a suit in equity to recover a rent, a defendant claiming to keep possession of the land, out of which the rent issued, might be decreed personally to pay arrears of rent accrued before the commencement of his tenancy. To prove these statements I cite the following authorities.

As to No. 1, it is sufficient to refer to Co. Litt. 47 b, and notes (2, 3), and 3 Black. Comm. 9, 10. What I think is the significant

<sup>1</sup> Co. Litt. 47; 3 Black. Comm. 6-14.

<sup>2</sup> Co. Litt. 47 a.

<sup>3</sup> 3 Black. Comm. 9, 10.



fact is that it is the *locality*, not the ownership of chattels, which at common law determined their liability to be distrained for rent.

As to No. 2, if arrears of a rent in fee were due and unpaid, and the rent owner died without having used any remedy to recover them, the arrears were lost at common law, neither his executors or administrators nor his heir or devisee having any remedy by distress or action to recover them.<sup>1</sup> The law was altered in this respect by stat. 32 Hen. VIII. c. 37, s. 1, which gave to such executors or administrators an action of debt for such arrears against the tenant or tenants that ought to have paid the rent in the deceased rent owner's lifetime, or against such tenant's executors or administrators; and further provided that it should be lawful for such executors or administrators to distrain for such arrears upon the lands charged with the payment of such rent and chargeable to the late rent owners' distress, so long as the said lands continued in the seisin of the said tenant in demesne, who ought to have paid the rent to the late rent owner in his life, or of any other person or persons claiming the said lands from the said tenant by purchase, gift, or descent, in like manner as the late rent owner might or ought to have done in his lifetime. But it was agreed,<sup>2</sup> after this statute, that if A had a rent service or rent charge in fee or for life, and the rent were in arrear, and afterwards A granted the rent over to another, and the tenant attorned and then A died, the arrears were lost; because the Act gave no remedy when the rent owner by his own act dispensed with the arrears, but only when the arrears were due to him at the time of death, and by the act of God became remediless. Again, if a rent in fee (whether rent service, rent charge, or rent seck) were in arrear and were afterwards extinguished, even by act of law, the arrears were lost, according to the common law,<sup>3</sup> and were not recoverable in an action of debt, because in such case the rent was purely a real thing, that is to say, a charge upon the land only and not on the person of the terre-tenant. It is true that in the cases of rent

<sup>1</sup> Ognel's Case, 4 Rep. 48 b, 49 b; Co. Litt. 162 a.

<sup>2</sup> Ognel's Case, 4 Rep. 50 b; Dixon v. Harrison, Vaughan, 36, 40, 41.

<sup>3</sup> See Ognel's Case, 4 Rep. 49, and Fitz. Abr., Executors, 71, there cited. In the case of rent service in fee Coke says, "The lord himself could by no possibility have an action of debt for the arrears, for the tenure was all in the realty." In the case of a rent charge in fee, if the grantee elected to charge the person of the grantor (where he might do so) in a writ of annuity the land was discharged of the rent; so that in this case also, the rent, as such, was all in the realty; see Litt. ss. 219-221, and Coke thereon; Pollock and Maitland, Hist. Eng. Law, II. 130.

service reserved on a lease for life and of rent granted for life, arrears of rent were recoverable, after the death of the lessee or grantee for life, in an action of debt. But the reason which Lord Coke gives for this distinction is that the creation of such rents amounts "to a real contract in law, which realty, when the estate of freehold is determined, dissolves itself into personalty."<sup>1</sup> What he meant by this, as I understand, was that on the creation of such rents there arose, not only a principal obligation of a real nature, charging the land, but also a secondary obligation (like that of a surety) charging the person of the terre-tenant, not as a matter of contract, but in respect of his tenancy of the land.<sup>2</sup> In such cases, therefore, it seems that there was a personal obligation on the terre-tenant to pay the rent, so that nonpayment was a good cause of personal action against him. The remedy on this cause of action, was, however, suspended during the continuance of the freehold in the rent, because, so long as the rent existed as a real thing, the personal obligation of the terre-tenant was eclipsed by the superior dignity of the freehold charge on the land.<sup>3</sup>

So long as there remained a freehold estate in the rent, the land, as we have seen,<sup>4</sup> was the principal debtor, and nonpayment of the rent was not an effective cause of action, without the rent were legally demanded.<sup>5</sup> And the essential part of a legal demand of rent was to make it *on* the land, and if no one were there, to make it *of* the land, as the principal debtor.<sup>6</sup> But when the freehold ended, the personal obligation imposed as above mentioned on the tenant still remained, though the real obligation, on the

<sup>1</sup> Ognel's Case, 4 Rep. 49 a; and see Fitz. Abr., Debt, 180.

<sup>2</sup> I think that this is well shown by Mountague, C. J., in *Kidnely v. Brand*, Plowd. 70, 71: "If a man makes a lease for life or years, rendering rent at such a feast, and that if it be in arrear he shall enter, there the lessor ought to come to the land and demand the rent, or else he shall never enter, for the rent is only payable upon the land, and the land is the debtor, for in assise for the rent the land shall be put in view, and he shall distrain on the land for the rent, so that *the land is the principal debtor, and the person of the lessee is no debtor but in respect of the land.*"

<sup>3</sup> See Y. B. 19 Hen. VI. 28, 29, pl. 49, per Paston; *Webb v. Jiggs*, 4 M. & S. 113.

<sup>4</sup> *Ante*, p. 3.

<sup>5</sup> The principal cause of disseisin of a rent charge or rent seck was denial of the rent, that is, nonpayment of the rent after it had been legally demanded; see Litt. ss. 233-240, and Coke thereon, especially 153 b, 161 b; *Bredinan's Case*, 6 Rep. 56; *Maund's Case*, 7 Rep. 28 b; *Bishop v. Grant*, Cro. Eliz. 324; *Speccot v. Sheres*, ib. 828; *Smith v. Smith*, Cro. Car. 507; *Morrice v. Prince*, ib. 520; *Cranley v. Kingswell*, Hob. 207. Denial, however, was no cause of disseisin of a rent service without rescous or resistance. Y. B. 40 Edw. III. 24, pl. 25; Co. Litt. 161 a.

<sup>6</sup> Plowd. 70, 71; Co. Litt. 201 b; and see the cases cited in the previous note.



land, was dissolved ; and so the arrears (if any) were recoverable in an action of debt.<sup>1</sup> Rent service reserved on a lease for years was recoverable in debt during the continuance of the lease, because such a lease, creating a chattel interest only, was merely a matter of personal contract. In this case, therefore, a personal obligation to pay the rent was laid on the tenant ; and this could always be enforced, as there was no freehold of which the superior dignity would eclipse it.<sup>2</sup> But, as we have seen,<sup>3</sup> in the case of a rent in fee, debt could never be maintainable at common law for any arrears ; for the land was, not merely the principal, but the only debtor.<sup>4</sup> In later time, a remedy in equity was allowed against the executors of a terre-tenant, who had omitted to keep down a rent charged on his land ; but in granting this remedy it was expressly recognized that the terre-tenant was not liable to pay the rent at common law. Thus in *Eton Coll. v. Beauchamp & Riggs*,<sup>5</sup> where a bill in equity was filed by the grantee of a rent against the terre-tenant and the executor of a deceased terre-tenant, the executor was decreed to pay the arrears, so far as he had assets ; but the reason given for this decision was that, *though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress*, yet, forasmuch as the testatrix held the land and did not pay the rent, her personal estate was thereby augmented.

As to No. 3, *Edrich's case*,<sup>6</sup> Pasch. 1 Jac. I., in replevin, on the last clause of the above mentioned stat. 32 Hen. VIII. c. 27, s. 1,

<sup>1</sup> *Ognel's Case*, 4 Rep. 49. And in *Lillington's Case*, 7 Rep. 38 b, "it was also resolved that, if a man grants a rent charge for life out of his land, and the rent is behind ; and the grantor enfeoffs A, and the rent is behind in his time ; and afterwards A enfeoffs B, and the rent is behind in his time ; and afterwards the grantee dies, his executors shall have an action of debt against each of them for the rent behind in his time."

<sup>2</sup> It was held that debt might be brought for rent on a lease for years without any demand ; *Dene's Case*, 1 Roll. 216 ; and arrears of such rent were not lost by assignment of the reversion, "for the contract remains, though the privity of estate is gone ;" *Midgley v. Lovelace*, Carth. 289.

<sup>3</sup> *Ante*, p. 5.

<sup>4</sup> In the case of rent service in fee, the tenant would never be charged personally, either in writ of annuity or in debt. *Fitz. Abr.*, Annuity, 52 ; *Co. Litt.* 144 a, b, 145 a ; *Roll. Abr.* 226 (Annuity, C) ; *Bac. Abr.*, Rent (K 2) ; 4 Rep. 49. In the case of a rent charge in fee, the tenant could only be charged personally by the rent owner's electing to sue for an annuity, which was an abandonment of the charge on the land. See note 3 to p. 5, above.

<sup>5</sup> *Hil. 20 and 21 Car. II.*, 2 Ch. Ca. 121, cited as law in 2 Wms. Ex'rs, Pt. IV. Bk. II. ch. 1. s. 1, p. 1722, 7th ed.

<sup>6</sup> 5 Rep. 118.

was as follows. A seised in fee of land held in socage devised a rent with clause of distress to B for the life of C and died. A's heir leased the land charged to D for life, remainder to E in fee. The rent was behind for divers years in the life of D. D died, then C died, then B distrained the remainderman (E) for all the arrearages incurred in the life of D. It was adjudged that the remainderman was charged with these arrears by the statute. And it was said that "in the principal case *all the land was charged with the rent*, and the heir held all his estate charged with it; and when he made the lease for life, the remainder in fee, he in remainder was chargeable, and in this case might have been distrained by the common law for the arrearages; but by the act of God, by the death of C, D" (an obvious error for B) "was prevented; which prevention the said last part of the said statute has supplied and remedied in this case, giving the grantee power to distrain, as if *cestui que vie* had been alive."

As to No. 4, in Y. B. 40 Edw. III. 24, pl. 25, it was held that arrears of rent service were charged on the land and recoverable in an assise against the tenant of the land for the time being. And in Y. B. 33 Hen. VI. 46, pl. 30,<sup>1</sup> there is a note that it was held by some justices and sergeants in a writ of trespass that in assise<sup>2</sup> of rent the plaintiff shall recover against the defendant, notwithstanding that the defendant were in of the land<sup>3</sup> but one month, and if the rent were in arrear for twenty years he shall recover against the defendant all the arrearages incurred to him.

As to No. 5, in Zouch v. Siddenham, 22 Eliz.,<sup>4</sup> an heir in tail was ordered in chancery to pay a rent reserved on the grant to his ancestor, and afterwards granted over so as to become rent seek; and it seems that he was ordered to pay some arrears accrued in his ancestor's time. In Boteler v. Massey (1675),<sup>5</sup> a rent in fee reserved on a sale in the ninth year of Henry VIII. had been paid till 1652. In 1675 it was refused to be paid, and the plaintiff, the heir of the grantee of the rent, having lost his deeds so that he could not recover at law, brought his bill in equity for the arrears. The defendant pleaded purchase for valuable consideration with-

<sup>1</sup> Abridged, Bro. Abr., Arrearages, pl. 13, Assise, pl. 10, Damages, pl. 10; Vin. Abr., Rent (Q b) 1.

<sup>2</sup> Viner rightly explains this to mean "in writ of entry in the nature of assise of rent."

<sup>3</sup> The printed Year Book says "of the rent;" but this is an obvious error, and is so treated by Brooke and Viner.

<sup>4</sup> Cary, 131.

<sup>5</sup> Finch, 241.



out notice, and enjoyment for thirty years without demand. Yet he was decreed to pay the arrears by the Master of the Rolls with interest, but by the Lord Chancellor without interest on account of the plaintiff's delay. And in *Busby v. Salisbury* (1676),<sup>1</sup> the plaintiff, as treasurer of Salisbury Cathedral and parson of Marlock, sued the defendant for £5 per annum, payable formerly by the Abbess of Lyon out of part of tithes belonging to the Rectory of Marlock, vested in the Crown on the dissolution of abbeys, and granted out again and forming part of the Salisbury estates, which rent was formerly paid by the defendant's ancestors to the plaintiff's predecessors till the late usurpation. But the defendant conceiving that in those tumultuous times many of the writings were lost, (as in truth they were) had for fourteen years past denied the payment thereof. The defendant pleaded that he claimed the premises as a purchaser under his marriage settlement; but the court decreed the arrears and future payments to the plaintiff forever. What is remarkable in the last two cases is the disregard of the plea of purchase for value without notice. This shows that in giving relief as to rent and its arrears, a court of equity regards itself as enforcing a legal charge on the land, out of which the rent issues. And the decrees made against the terre-tenant personally for payment of the rent and its arrears<sup>2</sup> should be referred, I submit, not to any personal liability on his part at law, but to the simple principle that, if the owner of land charged with the payment of money wish to keep the land, he must pay the money. The case, I think, is exactly parallel to that of one who has succeeded to land subject to a mortgage debt, which he is not personally liable to pay. He cannot be sued for the debt at law; but if he wish to avoid foreclosure, he must pay out of his own pocket all that is due, including arrears of interest which accrued due before he succeeded to the land.

The decision in *Cupit v. Jackson*,<sup>3</sup> that a court of equity might, if necessary, raise the arrears of a rent charge out of the estate by sale or mortgage, was expressly rested on the ground that the rent in question was a charge and an encumbrance on the real estate itself. I submit that the law is correctly stated in the reason so given. *Cupit v. Jackson* has been followed in this country in

<sup>1</sup> Finch, 256.

<sup>2</sup> See the decrees made in *Duke of Leeds v. Powell*, 1 Ves. 171, 172, and Suppl't, p. 98; *Duke of Leeds v. Corporation of New Radnor*, 2 Bro. C. C. 338, 518.

<sup>3</sup> 13 Price, 721, 737.

several cases, which are all collected in *Hambro v. Hambro*,<sup>1</sup> the latest of them. In that case it was strenuously argued that a rent charge was not a charge on the *corpus* of the land, out of which it issued, without express words to make it so. North, J., held it necessary to decide that exact point, but he reviewed all the cases in which the doctrine of *Cupit v. Jackson* had been discussed, showed that that doctrine had been applied to rents issuing out of land in the ordinary way, and not otherwise expressly charged in the inheritance, and came to the conclusion that the court had jurisdiction, in its discretion, to order the arrears of a rent charge to be raised by sale or mortgage of the land. If at law rent be a charge on the land out of which it issues, Professor Langdell's criticism<sup>2</sup> of *Cupit v. Jackson* loses its point. He has another objection to the doctrine of this case, that it is inappropriate to the case of annual payments which may be perpetual.<sup>3</sup> But if, to speak metaphorically, the rent owner has a charge on the goose, and not merely on the golden eggs, he is within his rights in trying to realize something by killing the goose when the golden eggs are no longer forthcoming. If he choose to forego the chance of having more eggs in future, that is his lookout, and as the remedy given by *Cupit v. Jackson* is discretionary, the court will take care that it is not exercised oppressively as regards the *terre-tenant*.

Next, I may mention that Professor Langdell, in arguing that one reason<sup>4</sup> allowed for giving relief in equity to an owner of rent would seem to justify the granting of such relief to a rent owner who has no right to distrain, says that there seems to be no authority directly upon the point.<sup>5</sup> But in *Cary*, p. 7, it is said, "Where a man made title to a rent seck of which there was no seisin, nor for which he had any action at the common law and prayed help here, it was denied upon conference had by the Lord Keeper with the judges, Mich. 1596."<sup>6</sup> Again, in *Palmer v. Whittenhal*,<sup>7</sup> where a bill was brought for payment of a rent of

<sup>1</sup> 1894, 2 Ch. 564.

<sup>2</sup> *Ante*, p. 2.

<sup>3</sup> 10 HARVARD LAW REVIEW, 93.

<sup>4</sup> Uncertainty of the rent owner, through loss of deeds or like reason, as to the kind of rent he has, so that he cannot distrain.

<sup>5</sup> 10 HARVARD LAW REVIEW, 92, 93.

<sup>6</sup> This agrees with Lord Coke's observation that, without seisin, the grantee of a rent seck "hath not any remedy either at the common law or in any court of equity." Co. Litt. 159 b.

<sup>7</sup> 1 Ch. Cas. 184. In this case also a plea of purchase for value without notice was treated as irrelevant.



which the plaintiff had been seised by receiving payment from the defendant's predecessors in title, a demurrer was allowed on the ground that, as it appeared by the bill that the plaintiff had had seisin, he might bring his assise at law; and it was said that, if there had not been a seisin, all the relief this court would have given would be but to give seisin. And there is other authority that if the owner of a rent charge has an effectual remedy at law, he will not be relieved in equity without good reason.<sup>1</sup> It seems likely, however, that Professor Langdell is speaking of proceedings in equity to recover a rent given without power of distress, and not recoverable by action, because an assise of rent is no longer maintainable. If the legal remedy by action be taken away, the case would certainly seem to fall within the principle on which relief has been allowed in equity. This brings me to consideration of the English cases mentioned at the beginning of this paper. For in this country, since the abolition of real and mixed actions to recover rent, a new remedy has been allowed to the rent owner by personal action against the terre-tenant at law. I will state the decisions establishing this in order of time.

In *Thomas v. Sylvester*<sup>2</sup> it was held that, since the abolition of real and mixed actions by statute 3 & 4 Will. IV. c. 27, s. 36, a personal action will lie against a tenant of land for the recovery of a rent charge *in fee* issuing out of the land. This was decided on the supposition that the case was analogous to the recovery of arrears of a rent for life, after the life had dropped, in an action of debt at common law. The judges<sup>3</sup> based their decision upon the proposition that at common law debt would lie for the arrears of a freehold rent charge (generally) when the freehold came to an end, as otherwise there would be no remedy. Although it is evident that they had *Ognel's Case*<sup>4</sup> open before them, they did not advert to the distinction most plainly pointed out there between rents in fee and for life, or to the reason given by Lord Coke for allowing debt for arrears an extinguished life rent.<sup>5</sup> And it does not appear to have been brought to the notice of the court that, at common law, debt could never lie for the arrears of a rent in fee, even after it had been extinguished by act of law.<sup>6</sup>

<sup>1</sup> *Holder v. Chambury*, 3 P. W. 255; *Duke of Leeds v. Powell*, 1 Ves. 171, 172; *Bouverie v. Prentice*, 1 Bro. C. C. 200; *Cupit v. Jackson*, 13 Price, 731.

<sup>2</sup> L. R. 8 Q. B. 368.

<sup>3</sup> See p. 6, above.

<sup>4</sup> *Blackburn, Quain, and Archibald*.

<sup>5</sup> See p. 5, above.

<sup>6</sup> 4 Rep. 48 b.

In *Whitaker v. Forbes*,<sup>1</sup> the declaration was by the executor of A, stating that B had devised all her lands to the defendant for life charged with an annuity of £500 to A during the joint lives of A and the defendant, and that the defendant had entered into possession of the lands at B's death, but had not paid the annuity; and the venue was laid in Middlesex. On demurrer to a plea that the land in question was situate beyond seas, to wit, in Australia, it was held that in such an action the venue was local, and it could not be maintained in England, because the defendant's liability arose from privity of estate, and not from privity of contract. *Thomas v. Sylvester*<sup>2</sup> was referred to by Brett, J., in *Whitaker v. Forbes*,<sup>3</sup> as "an authority for saying that when the statute got rid of real and mixed actions *the same remedy* would lie for arrears of the rent charge during the continuance of the estate (*sc.* the freehold in the rent), as after its determination." And Denman and Lindley, JJ., also referred to *Thomas v. Sylvester* as an authority that an action of debt might be brought during the continuance of such a rent as had been created in *Whitaker v. Forbes*.<sup>3</sup> In the latter case, however, the rent was for life only, and again the judges seem to have been quite unaware that debt never lay to recover the arrears of a rent in fee, after the determination of the freehold estate in the rent.

In *Christie v. Barker*,<sup>4</sup> where a rent charge had been granted by a private Act of Parliament to a vicar and his successors, who were by the Act to have the same remedies as are given by law for the recovery of rent in arrear, the tenant of part of the lands charged was held personally liable to pay the whole of the arrears of the rent charge upon the authority of *Thomas v. Sylvester*.<sup>5</sup> Brett, M. R., expounded the doctrine of *Thomas v. Sylvester* at considerable length; but the sum of what he said was this. When rent was payable to a freeholder's landlord, a debt became due to him from the tenant;<sup>6</sup> so long as the rent was recoverable in an assise, the inferior remedy of an action of debt was suspended; but debt was maintainable when the superior remedy no longer existed; *Thomas v. Sylvester* decided that, as the superior remedy had been taken

<sup>1</sup> L. R. 10 C. P. 583; 1 C. P. D. 51.

<sup>2</sup> L. R. 8 Q. B. 368.

<sup>3</sup> L. R. 10 C. P. 583, 585.

<sup>4</sup> 53 L. J. Q. B. 537.

<sup>5</sup> The same point had been previously decided in *Booth v. Smith*, 51 L. T. N. S. 395.

<sup>6</sup> As regards lord and tenant of a fee, the M. R. was entirely mistaken in this, as we have seen, *ante* pp. 5, 7.



away by statute, the inferior remedy was maintainable during the continuance of the freehold. Bowen, L. J., laid down law to the same effect,<sup>1</sup> saying, "The rule at common law is that an action of debt is merged in the higher remedy, but where the higher remedy is taken away, the action of debt still remains." He also remarked that, if the rent owner were aggrieved by denial of the tenant of payment of the rent, he had his remedy *not only against that person*, but also against the whole of the land out of which the rent issued. And both judges were apparently still quite unaware that debt was never maintainable at common law for the arrears of a rent in fee. Their decision that the tenant of part of the land was liable for arrears of the whole rent seems to have been based on the considerations that the rent issued out of every part of the land; that the Act gave the vicar the right to maintain such an assise for rent as was maintainable for rent service, and the remedy given by *Thomas v. Sylvester* was in lieu of this assise. But the court overlooked the fact that mere denial of the rent was no cause of action to recover rent service.<sup>2</sup> And it is to be noted

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<sup>1</sup> In this case, Bowen, L. J., also said, "In an assise of novel disseisin, if the case of the demandant" (I presume he meant the plaintiff) "was made out, *he was restored to the actual possession of the land until the rent was paid.*" This seems to be a mistake, as in an assise of rent the plaintiff did not recover seisin of the land charged, but only seisin of his rent. The plaintiff was entitled to the same judgment and writ of execution (*habere facias seisinam*), as in an assise of land; but in an assise of rent, the writ "was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in the case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin with all its consequences." *Grant v. Ellis*, 9 M. & W. 113, 123. If after the plaintiff had been so put in seisin of his rent, the arrears were not paid, it seems that his remedy was by *scire facias* upon his judgment. Thus in *Vin. Abr., Debt (N), pl. 12*, translating *Bro. Abr., Dette, 212* (citing 23 Hen. VIII.), it is said: "Where a man recovers in writ of annuity or assise, or has avowry for rent, which is frank tenement, and recovers the arrears without costs and damages, he shall not have action of debt of it, but *scire facias*, for it is real; but when he has judgment of it with costs and damages which goes together, so that it be mixed with the personalty, then lies writ of debt: — note the diversity." And it seems further that, upon a judgment against the defendant in *scire facias* so brought against him he would be personally liable. Thus in *Barnard and Tusser's Case*, 4 Leon. 184, pl. 287, *Wray, C. J.*, said, "If in a *scire facias* to have execution of an annuity the plaintiff hath judgment, upon such judgment he shall have an action for debt." If so, one may conjecture that such a judgment would be enforceable by *ca. sa.*, *fi. fa.*, or *elegit*. This point, however, is very obscure; and it seems impossible that these writs could have issued upon the original judgment, when that was properly executed by a writ of *habere facias seisinam*. See 3 Black. Comm. 412 *seq.* As to *scire facias* being the proper process to make the terre-tenant personally liable for the arrears of rent, see further *Fitz. Abr., Scire facias*, 100, 110, 130; *Bro. Abr., Annuity*, 17; *Vin. Abr., Execution (Q a 3), Scire facias (D 1)*.

<sup>2</sup> *Ante*, pl. 6, n. 5.

that, according to the law laid down in Brediman's Case,<sup>1</sup> foras-much as a rent charge or a rent seck is against common right, in an assise thereof, *all* the terre-tenants ought to be named as parties. So that the decision in *Christie v. Barker* is no authority for the proposition that an action of debt will lie, according to the doctrine of *Thomas v. Sylvester*, for the whole arrears of a *rent charge* against the tenant of part only of the land out of which the rent issues.

*In re Blackburn, &c. Building Society ex parte Graham*,<sup>2</sup> an un-registered company was mortgagee in possession of land subject to a rent charge in fee created by deed. The company was wound up under the 203d section of the Companies Act, 1862, and the liquidators for some time paid the rent charge. Then, finding that the annual value of the property was not equal to the rent charge, they obtained leave from the court to get rid of the land, and gave notice to the tenant in occupation of the land and to the owner of the rent charge that they repudiated the land. The owner of the rent charge claimed to prove in the winding up for arrears which had accrued since the repudiation; but it was held by the Court of Appeal that the company were only liable so long as they were owners of the land, that the liquidators had sufficiently repudiated the ownership of the land, and that no subsequent claim could be made for the rent charge. Lord Esher, M. R., said:<sup>3</sup> "It was contended on the authority of *Thomas v. Sylvester* that the claim could be made, because the liability for the rent charge was a debt. But that case did not decide anything of the sort. All that was decided in that case was that it was a claim arising out of an interest which a tenant has in the possession of land and in the profits of the land at the time when the rent charge became due. It was so far a right in respect of the enjoyment of the land, that, before the passing of the Common Law Procedure Act,<sup>4</sup> it was the subject of a real action which was not brought on contract, but on a right arising out of the land; and it was held that when real actions were abolished another remedy, namely an action of debt, was left, otherwise the owner of the rent charge would be left without any legal remedy."

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<sup>1</sup> 6 Rep. 58 b, F. N. B. 178 d, which was actually cited in *Christie v. Barker*, is to the same effect.

<sup>2</sup> 42 Ch. D. 343.

<sup>3</sup> Page 346.

<sup>4</sup> This is an obvious slip for the Act of Will. IV., abolishing real actions.



In *Searle v. Cooke*,<sup>1</sup> an action was brought in the Chancery Division by the assignee of a rent charge in fee, which had been created upon the enfranchisement of certain copyholds under the Copyhold Act, 1852, at the instance of the lord, against the tenant of the enfranchised land and his mortgagees, both to recover arrears of the rent charge and to have the boundaries of the land charged determined. Kay, J., after referring to the cases which establish that a rent owner shall have relief in equity where the lands charged or the boundaries thereof are uncertain, said :<sup>2</sup> "With respect to the arrears of the rent charges, *Thomas v. Sylvester* and *Christie v. Barker* seem to be distinct authorities that an action of debt may be maintained for these arrears ; but, if not, under the equitable jurisdiction of the court, an order must be made for payment in accordance with the cases to which I have referred. In the Court of Appeal the judgment was affirmed, Cotton, L. J., saying :<sup>3</sup> "It is said that an action cannot be brought for payment of arrears of a rent charge. It was, however, decided by *Thomas v. Sylvester*, and I think rightly decided, that such an action could be brought. In former times, when real actions could be brought, a personal action for debt for payment of a rent charge did not lie, but now that such actions are abolished all the judges in that case laid down the right of the person entitled to a rent charge to bring an action for debt against the tenant in possession of the land."

In *Pertwee v. Townsend*,<sup>4</sup> the tenant of land charged with a rent payable to a vicar and his successors was held by Collins, J.,<sup>5</sup> to be personally liable to pay the whole of the rent, although the annual profits of the land were insufficient to satisfy the amount of the rent. This was based partly on the ground that, in an assise to recover the rent at common law, the whole of the rent could have been recovered against the tenant, irrespective of the amount of the profits of the land, and partly on the supposition that the point was involved in the decision in *Christie v. Barker*.

In *Re Herbage Rents, Greenwich*,<sup>6</sup> Stirling, J., held that a tenant for years is not liable to be sued in an action founded on *Thomas v. Sylvester*, for arrears of a rent in fee charged on his land. This was decided on the ground that, at common law, such a rent (in so

<sup>1</sup> 43 Ch. D. 519.

<sup>3</sup> Page 532.

<sup>2</sup> 43 Ch. D. 528.

<sup>4</sup> 1896, 2 Q. B. 129.

<sup>5</sup> Following *Swift v. Kelly*, 24 L. R. Ir. 107, in preference to *Odium v. Thompson*, 31 L. R. Ir. 394.

<sup>6</sup> 1896, 2 Ch. 811.

far as it was recoverable by action and not by distress) could only be recovered in an action brought against the freeholder. Numerous authorities are cited in the judgment; but the reasons above stated for the decision in *Thomas v. Sylvester* are repeated and accepted.

Now *Thomas v. Sylvester* may be good law, in so far as it decided that the terre-tenant is personally liable to pay a rent for life; because, in the case of a rent for life, nonpayment of the rent was a cause of action of debt at common law, and the remedy on this cause of action was merely suspended during the continuance of the freehold in the rent.<sup>1</sup> But as to the point actually decided therein, it is submitted that *Thomas v. Sylvester* is open to the criticism that the analogy relied on as the ground of decision wholly fails, nonpayment of a rent in fee being no cause of action of debt at common law.<sup>2</sup> It appears therefore that in this case an action was held to lie, under the reformed procedure introduced by the Common Law Procedure Act, 1852, upon a state of facts which afforded no cause of action against the defendant at common law. Such a conclusion, however, seems to be inconsistent with the recent case of *Companhia de Moçambique v. British South Africa Co.*,<sup>3</sup> in which the House of Lords held that the English courts have no jurisdiction, under the Judicature Acts of 1873 to 1875, to entertain an action for trespass to land beyond the seas, because such a trespass gave rise to no cause of action at common law.<sup>4</sup> It was there plainly laid down that the test of obtaining relief in our English courts, now that the old formal actions have been abolished, is whether the plaintiff has a good cause of action. In *Thomas v. Sylvester*, it has been shown that the plaintiff had no cause of personal action; and he could have no cause of real or mixed action, because such remedies for the recovery of rent had been expressly abolished by statute without any saving.<sup>5</sup> On

<sup>1</sup> See *ante*, pp. 6, 7.

<sup>2</sup> See *ante*, p. 5.

<sup>3</sup> 1893, App. Cas. 602.

<sup>4</sup> The plaintiffs urged that the abolition of venue by the Judicature Acts rendered such an action maintainable; but the court held that, as regards land beyond the seas, the rule of common law requiring the venue to be local in trespass *quare clausum fregit* was substantive and not merely procedural.

<sup>5</sup> By Stat. 3 & 4 Will. IV. c. 27, s. 36, all real and mixed actions were abolished, except writ of right of dower, writ of dower *unde nihil habet*, *quare impedit*, and ejectment. But ejectment could never be brought to recover a rent. Cro. Car. 492; 3 Black. Comm. 206; 2 Tidd's Practice, 1193, 9th ed.; Cole on Ejectment, 91.



what ground, then, could he be liable? It does not appear sufficient to say that otherwise there would be no remedy. When a statute takes away an action, the liability is removed. Acts which before were actionable no longer constitute a cause of action; a state of facts that formerly gave rise to an obligation is not now productive of any legal bond. It is therefore submitted that the courts have no jurisdiction to impose directly, under the present procedure, that personal liability to pay a rent in fee, which at common law could only be fixed on the terre-tenant in case of his contempt of the judgment in a real or mixed action to recover the rent;<sup>1</sup> as it is exactly that liability which the Act of Will. IV. removed.<sup>2</sup>

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<sup>1</sup> See *ante*, p. 13.

<sup>2</sup> To put a parallel case. By the Statute of Gloucester, 6 Edw. I. c. 5, waste by a tenant for life was a cause of forfeiture of the place wasted, in case a writ of waste were issued against him. Afterwards a tenant for life was held to be liable in damages for waste in an action on the case; 2 Wms. Saund. 252, n. (7). This duplicate liability continued until 1833, when the writ of waste was abolished by Stat. 3 & 4 Will. IV. c. 27, s. 35; see 3 Steph. Comm. 532, n. (p), 6th ed. Could it be seriously argued that the courts have jurisdiction, since that enactment, to impose in any form of proceeding the liability to forfeiture for waste, which could only be enforced before by suing out a writ of waste?

## THE PLEDGE-IDEA: A STUDY IN COMPARATIVE LEGAL IDEAS. III.

### 8. GREEK LAW.<sup>1</sup>

THE terms of Greek law are important as throwing light on the terms of the later Roman law. The generic term for a pledge, with or without pledgee's possession, was *ὑποθήκη*. That this was generic, and was not restricted to pledgor's possession, is abundantly testified;<sup>2</sup> though in post-classical times, the practical condition was, on account of the extensive use of a registry-system, much like that of our own, — i. e. realty was usually left in the pledgor's possession, while personalty was not, so that the Romans of the later Empire found *ὑποθήκη* applied customarily to realty and to pledgor's possession.<sup>3</sup> The classical term for the specific case of pledgee's possession was *ἐνέχυρον*,<sup>4</sup> though this in later usage, comparatively, would be chiefly applicable to personalty.

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<sup>1</sup> The Greeks were not a lawyer-nation, in the way in which the Romans and the English were; they did not have the *elegantia juris*, the taste for legal principle as such, even in the degree in which the Jews and the Japanese had it; they possessed merely a body of customary law, such as other civilized peoples have developed. The material comes to us chiefly through the great orators and a few inscriptions; the fragments of only one law-book (Theophrastus) survive, and that is only an attempt to make a collection of the various customs.

References: 1869, Telfy, *Corpus Juris Attici*; Köhler, *Corpus Inscriptionum Atticarum*, II, No. 4, and Supplement of 1896; 1895, Dareste, Houssoullet, and Reinach, *Recueil des Inscriptions Juridiques Grecques*; 1663, Salmasius (Saumaise), *De Modo Usurarum*; 1825, Platner, *Der Process und die Klagen bei den Attikern*; 1867, Dareste, *Prêt à la Grosse chez les Athéniens*; 1877, Id., *Une loi éphésienne du premier siècle avant notre ère*, *Nouv. rev. hist. du droit fr. et étr.*, I, 161; 1884, Id., *La transcription des ventes en droit hellénique*, ib., VIII, 380; 1885, Id., *Les inscriptions hypothécaires en Grèce*, ib., IX, 1; 1869, Büchschütz, *Besitz und Erwerb im Griechischen Alterthum*; 1870, Hofmann, *Beiträge zur Geschichte des Griechischen und Römischen Rechts*; 1870, Caillemet, *Le contrat de vente à Athènes*, *Rev. de Législ. fr. et étr.*, 1870, 647; 1887, Meier u. Schömann, edited by Lipsius, *Der attische Process*; 1891, Goldschmidt, *Universalgesch. d. Handelsrecht*; 1891, Fustel de Coulanges, *Nouvelles Recherches, Le droit de propriété chez les Grecs*; 1893, Guiraud, *La propriété foncière en Grèce*; 1893, Sieveking, *Das Scedarlehnen des Alterthums*. The important essay by Szanto, *Hypothek u. Scheinkauf im Griechischen Rechte*, *Wiener Studien*, 1887, 279, has not been accessible.

<sup>2</sup> Salmasius, cc. XIII, XIV; Platner, 302; Meier & S., 505.

<sup>3</sup> Salmasius, c. XIII, beginning.

<sup>4</sup> References *ante*; though this also was used generically: Harpocration, quoted in *Inscr. Jurid. Gr.* 124.



The rules of Greek pledge-law now known to us are few. (I.) The compounds of the same verb-stem served to express the ideas of (1) "pledge," (2) "bet with stakes," and (3) "promise."<sup>1</sup> The pledgee apparently had the risk of a deficit or loss;<sup>2</sup> and he clearly had, all through the classical period, no duty to restore the surplus;<sup>3</sup> only towards the Christian era do we see any trace of such a duty.<sup>4</sup> Of the pledgee's defect of title and of his expedients for curing it, by *resignatio*-clause or otherwise, we hear nothing, except for the hypothec. (II.) The hypothec appears simply as a pledge which the pledgor kept until default,<sup>5</sup> and then the pledgee either entered or (if obstructed) brought suit for eviction.<sup>6</sup> What has been said as to deficit and surplus applies equally to the hypothec; except that in the *ναυτικὸν δάνεισμα* (*fœnus nauticum*, a precursor of bottomry), the risk was certainly on the pledgee.<sup>7</sup> The instances of hypothec are almost always

<sup>1</sup> (1) *τιθέναι*, *θέσις*, as generic: Büchschütz, 484; (2) *παρακατάθηκη*, Platner, 364, *ἐπιδιατίθεσθαι*, Meier & S., 521, Telfy, No. 1526; (3) *συνθήκη*, *συντίθεσθαι*, M. & S., 494. Again, *ὀπλάλαγμα* was colloquial for *ἐνέχυρον*: Salmassius, 581; while *συνάλλαγμα* was an ordinary phrase for contract. Again, *ἑγγυον δάνεισμα*, distinguished from *ναυτικόν*, was a loan secured by realty: Büchschütz, 490; and *ἐγγυητής* was a personal surety: Salmassius, 707; while *μεσεγγυῶν*, *-ημα*, was a bet: Platner, 364; M. & S., 521. In Salmassius, 581 ff., will be found an interesting collation of the Greek, Hebrew, and Latin variants of *ἀρραβών*, *arrabo*, *arraha* pointing out their primitive sense of "pledge," as well as the surviving one of "earnest"; and this primitive connection of "earnest," "pledge," and "forfeit," as worked out for Germanic law by Franken (§ 4) is undoubtedly full of significance.

<sup>2</sup> Büchschütz, 485; Hofmann 115; Platner, 308; all building on a passage in Lysias, *Κακόλογ.*, 10.

<sup>3</sup> F. de Coulanges, 143; Guiraud, 283, 287; Büchschütz, 485, 491; Dareste, *Une loi éphésienne*, 171. Platner, 307, and M. & S., 509, make the opposite statement, but cite no authority. A conclusive fact would seem to be that while the pledgee on default is mentioned as having the right to get possession by entry (*ἐμβάτευσις*) or action for eviction (*δικὴ ἐξούλης*), nothing at all is said about paying over any surplus; the above authors probably assume that this was implied, but the implication, as our comparative study indicates, would be just the opposite.

<sup>4</sup> Dareste, *ib.*, where as a war-measure all unsecured loan-claims were declared extinguished, and all pledges were to be apportioned between pledgee and pledgor according to the amount of the original claim.

<sup>5</sup> Dareste's phrase is "un droit suspendu." A phrase (Kohler, No. 1139; Inscr. Jur. No. 62) which is perhaps typical of the thought is: "*ὅρος χορίου καὶ οἰκίας ὑποκειμένων* [. . . naming amount], *ὅστε ἔχειν καὶ κρατεῖν τὸν θέμενον κατὰ συνθήκας* [contract document] *παρὰ* [deposited with] *Δεινίᾳ Εὐωνυμείᾳ*"; i. e. to become the pledgee's property on the terms described in the document. Dareste misunderstands this phrase as implying present possession by the pledgee; but this cannot be, for the *ὅρος* shows (see *post*) that the pledgor retained possession.

<sup>6</sup> Platner, 268; M. & S., 423, 747; Guiraud, 287; F. de Coulanges, 143.

<sup>7</sup> Büchschütz, 486; Sieveking, 19; Goldschmidt, *Handelsr.*, 349; Dareste, *Prêt à la*

provisions for a future contingent, not a past default, indicating the same notion as in Germanic law.<sup>1</sup> Again, the inability to conceive of a second hypothec on the same *res* at the same time is another mark of the primitive idea.<sup>2</sup> Finally, there is nothing in the mode of transfer of title to indicate that the hypothec did not follow, as in Germany, the normal modes of transfer.<sup>3</sup> (III.) The

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Grosse, 41. A minor evidence, but after all a most significant one, for the forfeit or equivalency idea in the hypothec is the constant use of ἀποτιμῶν, ἀποτιμήματα, said of the things valued; ἀποτιμήσασθαι, -θέντες said of the pledgee; ἀποτιμῶν, said of the pledgor: Telfy, Nos. 1518, 1527; Köhler, 1106, 1124; Platner, 263, 281, 302; M. & S., 419, 507. When the husband, lessee, etc., gave a hypothec for a possible default, it was essential that a specific portion of land, etc., should be set apart and "appraised" as the equivalent thus predetermined, i. e. to be accepted, for better or for worse, as the ultimate satisfaction. Now if this appraisal had anything to do with surplus-restoration, it would be found also in the ordinary pledge, but it is found exclusively in the hypothec, and must mean, here as in other laws, that the portion was thus appraised beforehand because it was to be the sole resource of the pledgee on default. This explains the passage of Demosthenes so misunderstood by Platner (305) and others: "νόμος, ὃς οὐκ ἐξ διαρρήδην, εἰς & [or ὅσα] τις ἀποτίμησεν, εἶναι δίκας; . . . ὃς οὐκ ἐξ τῶν ἀποτιμηθέντων [i. e. pledgees] ἔτι δίκην εἶναι πρὸς τοὺς ἔχοντας"; i. e. the pledgee has no further claim over and above the portion thus appraised in advance.

<sup>1</sup> The usual purposes are: a guardian's liability for the minor's property, a husband's liability for the *dos*, a lessee's liability for rent. See examples in Dareste, Les inscriptions, etc.; Köhler, Nos. 1055, 1059; Guiraud, 284; and references in the preceding note.

<sup>2</sup> Büchschütz, 491; Dareste, Une loi, etc. (in which the application of the principle is clearly demonstrated); id., Les inscriptions, etc. (where he acutely suggests that the reason the ὅροι, or hypothec-stones, bore no date, was that, as only one such lien could exist, the question of priority, and therefore of dates, was immaterial; yet in Inscr. Jurid., at 130, he seems to ignore this original attitude); Telfy, No. 1509 ("μὴ ἐπιδάεσθαι ἐπὶ τοῖς αὐτοῖς ἐνεχούροις"); M. & S., 526. The second lender was thus obliged to pay off the amount of the first loan; and take the title to cover both; we have already seen this process resorted to in Chaldea; Demosthenes describes it as followed in Greece; and it will be found in Rome again.

<sup>3</sup> In many regions there were public registers for the entry of transfers, including hypothecs; Hofmann, 80 ff.; Guiraud, 285-287; sometimes they were publicly cried in the streets: ib.; whether there were such registers at Athens is disputed: Caillmer; Dareste, La transcription, etc. A typical feature at Athens was the ὄρος, or boundary-stone (Salmasius, 636; B., 490; Platner, 304; Dareste, Les inscriptions; and preceding references), of pyramid shape, placed in the country at the boundaries, and in the city before the house, and inscribed with the amount and names in case of a hypothec or sale-for-resale. But the hypothec was equally valid though no ὄρος was used (Inscr. Jurid., 138; B., 490); and the important thing to notice is that the ὄρος had nothing to do with the transfer of title; for it was not used where the pledgee took possession (of the seventy examples in Köhler, all are either of sale-for-resale — where the vendee had probably leased back — or of guardian's or husband's hypothec, or of vendor's lien; No. 1139 has been explained *ante*), and it was used for vendor's lien (Telfy, 1508, note; Dareste, Les inscriptions), as well as for the ordinary hypothec; in short, its purpose was chiefly to prevent the pledgor from erecting his possession by fraud into a title, and, secondarily, to warn subsequent innocent creditors.



sale-for-resale form was very common, and seems usually to have been followed by a lease back to the pledgor.<sup>1</sup> As the duty of surplus-restoration was not recognized, and as there is no trace of any interest-prohibition or usury-rate,<sup>2</sup> the sale-for-resale appears as a form practically interchangeable with the pledge, and the theory of its primitive purpose already advanced seems corroborated. (IV.) There seems to be no indication that the Vif-gage transaction (reckoning fruits against capital-debt) had been resorted to in classical times.<sup>3</sup> Negatively this indicates that such a reckoning is merely a stage in the development of the ordinary pledge. The absence equally of any usury-ban, and of any duty of accounting, are concurrent marks of the primitive stage in which we find Greek custom. It is to be noted, in conclusion, that the term "antichresis," which later appears in Roman law, is not found in classical Greek.<sup>4</sup>

#### 9. ROMAN LAW.<sup>5</sup>

If the forfeit-idea has never been hitherto applied to explain the development of the present subject in Roman law, it is perhaps partly because much that has been written on the subject

<sup>1</sup> Büchsen-schütz, 491; F. de Coulanges, 141; Guiraud, c. X; examples will be found in Köhler, 1059-1139; Daresté, La transcription, 391; id., Les inscriptions, *passim*. Out of the 50 inscriptions in Köhler, 28 are in the sale-for-resale form, and in those of his Supplement the proportion is about the same; the typical phrase is, "ἔπος χωρὶς πεπραμένου ἐπὶ λύσει"; while of the hypothec it is, "ἔπος οἰκίας ἐν προικί [dowry] ἀποτιμημένης."

<sup>2</sup> Büchsen-schütz, 496.

<sup>3</sup> Büchsen-schütz, 485, and Guiraud, c. X, assert the contrary, but give no authority.

<sup>4</sup> *Χρῆσις* was the term for loan (M. & S., 512; Salmasius, 618, 629); and as Salmasius points out, *ἀντίχρησις* means merely a counter-loan or mutual loan, i. e. land and money loaned in exchange; the bearing of this will be discussed in speaking of the Roman law.

<sup>5</sup> References: 1872, 1884, Krueger v. Mommsen, *Corpus Juris Civilis*; 1879, Huschke, *Jurisprudentia Antejustiniana*, 4th ed.; 1887, Bruns, *Fontes Juris Romani Antiqui*; 1891, Krueger u. Studemund, *Collectio Librorum Juris Antejustiniani*; 1636, Salmasius, *De Modo Usurarum*; 1832, Wächter, Wer hat bei Obligationen die Gefahr zu tragen? *Arch. f. civil. Praxis*, XV, 132; 1846, Rudorff, Ueber die Pfandklagen, *Z. f. gesch. Rechtswiss.*, XIII, 181; 1847, Bachofen, Das Römische Pfandrecht; 1860, Dernburg, *Pfandrecht*; 1888, Id., *Pandekten*, 2d ed.; 1870, Degenkolb, Ein Pactum Fiduciæ, *Z. f. Rechtsgesch.*, IX, 117; 1870, Hofmann, *Beitr. z. Gesch. d. Griech. u. Röm. Rechts*; 1876, Jourdan, *L'Hypothèque*; 1882, Kohler, *Pfandrechtliche Forschungen*; 1887, Geib, *Actio Fiduciæ und Realvertrag*, *Z. d. Sav. Stift.*; 1888, Voigt, *Der Pignus der Römer*, *Kön. Sächs. Ges. d. Wiss.*, 1888, XL, 236; 1889, Heck, *Die Fiducia cum amico contracta*, *Z. d. Sav. Stift.*; 1891, Cuq, *Institutions Juridiques des Romains*, *L'Ancien Droit*; 1891, Biermann, *Custodia u. Vis major*, *Z. f. Sav. Stift.*

is open to the criticism once uttered by a German jurist:<sup>1</sup> "These writers," he says, "treat the compilation of Justinian as if it were a modern code,—a manner of treatment which is in fact wholly inapplicable to the *Corpus Juris Civilis*; the writer who is to expound the pure Roman law must never forget that the principles and rules collected in that law-book had their sources throughout a period of more than five hundred years; and he should know that law does not stand still for five hundred years, and that perhaps no system of law ever went forward so rapidly as that of Rome in the first five centuries of our era." It is of course dangerous for one not trained in the Roman system and practised in its application to attempt to reach positive conclusions; but in this instance the evidence is apparently so strong that one may be excused for rehearsing it and pointing out its significance.<sup>2</sup>

But, first, a clear understanding as to the technical terms in Roman law. A commonly accepted notion is that *pignus* is not a generic term at all; that it is limited (1) to movables,<sup>3</sup> and particularly (2) to the pledgee's possession.<sup>4</sup> Both these limitations, it must be said, are without foundation.<sup>5</sup> (1) *Pignus* was applied indiscriminately to movables and immovables, *res Mancipi* and *nec Mancipi*.<sup>6</sup>

<sup>1</sup> Biermann, in Z. d. Sav. Stift., 1877, 33.

<sup>2</sup> The Roman lawyers quoted *post* lived at the following approximate dates: A. C. 1-50, Labeo; 50-100, Javolenus; 100-150, Pomponius, Gaius; 150-200, Gaius, Scævola, Papinian; 200-250, Ulpian, Paulus, Marcian, Modestinus. This ends the classical period of Roman law. The Code quotations *post* (with one or two exceptions of about 223 A. C.) are later than these lawyers.

<sup>3</sup> Cuij, 636, *semble*; Dernburg, 46 ("wesentlich"); 1895, Buckler, Contract in Roman Law ("probably"). But this, to be sure, is hardly asserted as matter of law; it is merely regarded as a practical consequence of the limitation next mentioned.

<sup>4</sup> Taking only English works, and those of the last quarter-century, the following treatises illustrate the popularity of this notion: 1870, Mackenzie, Studies in R. L., 3d ed.; Tomkins and Jencken, Modern R. L. ("originally"); 1876, Hunter's R. L.; 1878, Sandars, Institutes of J.; 1884, Morey, Outlines of R. L.; 1886, Whitfield's Salkowski, R. Private L.; 1890, Poste, Gaius, 3d ed.; 1892, Ledlie's Sohm, Institutes of R. L.; 1893, Chamier, Manual of R. L.; 1895, Buckler, Contract in R. L.

<sup>5</sup> Except that the Greek Jurists of Justinian's time used them; but the usage, as we shall see, was late and local.

<sup>6</sup> Innumerable quotations could be given: "insula," D. 41, 2, 36; "fundum," D. 44, 7, 16; "fundum vel hominem," D. 27, 9, 5, § 3; "fundus," D. 45, 1, 85, § 6; "fundus," D. 8, 1, 16; "fundum," D. 13, 7, 18, § 3; "prædia," citations in Dernburg, 34; "agrorum," C. VIII, 16, 2; "domus," D. 20, 1, 29, § 2; "ager," D. 20, 4, 3, § 2; "insula," D. 20, 2, 1. The Latin of the invaders, after the fall of the Empire, was equally indiscriminate: "vinea et terra" (871 A. D.); "terra" (1000's); "villam" (1105), "prado" (748), cited Köhler, 87, 93, 353, 84, and others in the same volume and in



(2) *Pignus* was applied indiscriminately to a pledge retained by the pledgor and to one handed to the pledgee; the distinction being expressed by a different verb employed with *pignus*.<sup>1</sup> In other ways, too, in the classical usage (down to, say, Justinian's time), *pignus* is seen as the generic term for the subject, like *wed* in Germanic usage.<sup>2</sup> Why should this truth ever have been doubted? Because of the misunderstanding of a few misleading passages of the classical jurists, and because the alien usage of Justinian's time did employ *pignus* with the above limitations.<sup>3</sup>

those cited in the preceding articles. In the face of the numerous instances quoted in his own volume, it is singular that Dernburg can write (46) that *pignus* "blieb dann wesentlich auf bewegliche Sachen beschränkt."

<sup>1</sup> We know this chiefly (1) by finding *pignus* where it unmistakably appears that the pledgor kept possession; (2) by the fact that the Salvian interdict and the Servian and quasi-Servian actions were intended for pledgees desiring to obtain possession, and that *pignus* and *pigneraticia* were used in connection with them. For a few illustrations of (1) see D. 20, 2, 4 and 5; 20, 1, 1; 20, 5, 13; 43, 32, 1, § 5; 47, 2, 61, § 8; C. IV, 65, 5. A perusal of titt. 13 and 20 of the Digest will easily convince; but the exhaustive survey of Voigt, in the essay above referred to, ought to put the matter beyond future question. Cuq (634), Jourdain (90), Rudorff (201), Dernburg (64; but see his Pandekten, 636), and Bachofen (8) accept *pignus* as covering pledgor's possession. A significant bit of evidence, not pointed out by Voigt or Salmasius, is found in the passages in which a problem is put about a *hypotheca* (or, most significantly, a Greek *ὑποθήκη*), and then the jurist proceeds to discuss it in terms of *pignus* exclusively; e. g. Scævola, in D. 20, 1, 34; Paulus, in D. 20, 3, 4; Gaius, in D. 20, 4, 11, and 20, 6, 7, § 4; Marcian, in D. 20, 1, 13, § 1, and 20, 4, 12, § 9.

<sup>2</sup> For example, in the generic use of *pigneraticia* coupled with *actio*; and in the phrase *jure pignoris* as employed when specifically dealing with a *hypotheca* (e. g. C. VIII, 25, 11, A. C. 532). It is interesting to note that the broadly generic use of *pignus* was fully pointed out in 1636 by Salmasius (cc. XIII, XIV), and that not until Voigt's essay, in 1888, has this doctrine been thoroughly understood and clearly brought out by a modern scholar; Salmasius' demonstration seems to have been wholly overlooked, except by Révillout (Oblig. en droit égypt., 233). Many have agreed that *pignus* in classical times bore the broader meaning; but the important fact is that it was the generic term from the very first.

<sup>3</sup> These passages seem to be only five in number:—

(1) Gaius, in D. 50, 16, 238, § 2: "Pignus appellatum a 'pugno' [fist], quia res quæ pignori dantur manu traduntur; unde etiam videri potest verum esse, quod quidam putant, pignus proprie rei mobilis constitui."

(2) Florentinus, in D. 13, 7, 35, § 1: "Pignus, manente proprietate debitoris, solam possessionem transfert ad creditorem; potest tamen precario et pro conducto debitor re sua uti."

(3) Ulpian, in D. 13, 7, 9, § 2: "Proprie pignus dicimus quod ad creditorem transit, hypothecam cum non transit nec possessio ad creditorem."

(4) Isidorus, Orig. V, 25, 22 and 24 (Bruns, 408): "Pignus est, quod propter rem creditam obligatur, cuius rei possessionem solam ad tempus consequitur creditor; ceterum dominium penes debitorem est; . . . hypotheca est, cum res commodatur sine depositione pignoris, pactione vel cautione sola interveniente."

(5) Inst. IV, 6, 7: After pointing out that there is no legal difference with respect

But the legal sources of the latter date are comparatively few ; and for the Roman law down to, say, 500 A. D., *pignus* is the generic term with the lawyers and with the people. *Fiducia* is the sale-for-resale form. *Hypotheca* is a word used by the Greek Justinianean jurists for a pledge with pledgor's possession. We

to the creditor's form of action : " Sed in aliis differentia est ; nam pignoris appellatione eam proprie contineri dicimus quæ simul etiam traditur creditori, maxime si mobilis sit ; at eam quæ sine traditione nuda conventionione tenetur, proprie hypothecæ appellatione contineri dicimus."

As to the first passage, it proves merely that a few persons then thought that *pignus* was " peculiarly " applied to movables, but that the orthodox view was to the contrary. As to the second, it rather proves the present proposition, by asserting that a *pignus* may be valid though remaining in the pledgor's hands *precario*, i. e. the typical hypothec-form of the *pignus*. As to the third (supposing it genuine, which Puchta doubts, Pandekten, 12th ed., 1877, 193, note), it involves no denial that *pignus* can be used generically, but merely an assertion of a distinctive usage ; moreover, the very same author is reported as writing (D. 13, 4, 1) : " Pignus contrahitur non sola traditione, sed etiam nuda conventionione, etsi non traditum est," a proposition not to be mistaken. As to the fourth, the author's date (ob. 636 A. C.) and his presumable use of Justinianean sources, puts it on the same footing as the next. As to the fifth, it may be conceded that it represents the Justinianean (Greek) notion of *pignus*, but that is a very different thing from the classical usage of nearly four centuries before (as will be explained), and proves nothing on that point. On the other hand, and quite apart from the ample proof mentioned in the preceding note, there are equally categorical assertions representing the present contention ; (1) the Ulpian passage *supra* ; (2) four passages of Paulus : D. 20, 1, 29 : " Paulus respondit generalem quidem conventionem sufficere ad obligationem pignorum " ; 2, 14, 17 : " De pignore jure honorario nascitur ex pacto actio " ; 2, 14, 4 (" item quia," etc.) ; 47, 2, 67, § 1 : " Si is qui rem pignori dedit, vendiderit eam ; quamvis dominus sit, furtum facit, sive eam tradiderat creditori, sive speciali pactione tantum obligaverat " ; (3) C. VIII, 16, 2, A. C. 207 : " Cum constet pignus consensu contrahi," etc. ; (4) Pomponius, in D. 13, 7, 8, 5 : " Cum pignus ex pactione venire potest," etc. ; (5) Marcian, in D. 20, 1, 5, § 2 : " Inter pignus autem et hypothecam tantum nominis sonus differt," which at least is clear for the present purpose (its further difficulty being explained later). For classical usage, then, these may be taken as completely offsetting the doubtful passage of Ulpian ; and the question is at least thrown open to the inductive evidence of the sources themselves, as indicating the actual usage ; and on this basis, as above indicated, there can be no doubt. But how is the later and Justinianean usage accounted for ? As already pointed out (*ante*, p. 18), ἐνέχυρον in later Greek usage (see the Egyptian papyrus of 359 A. C. in Bruns, 266) *did* apply peculiarly to property held by the pledgee, while ὑποθήκη had become restricted to a *res* kept by the pledgor, i. e. peculiarly, an immovable. Now Justinian and his compilers knew Greek better than they did Latin, and, living across seas in the Byzantine capital, they naturally described the " distinctive " usage to be what they were accustomed to. But it was a usage which, however categorically they assert it for themselves, cannot possibly be made to harmonize with that of the classical jurists whose works they digested (as Voigt, 244, points out), and does not harmonize with the orthodox usage which the Germanic invaders found at Rome and perpetuated in the Latin they there learned. For the Justinianean usage as wholly peculiar, see Voigt, 242 ff. ; and for an explanation of how the compilers employed the term *hypotheca*, see Salmasius, cc. XIII, XIV, and *post*, p. 33, in this article.



come now to the development of the pledge-idea, taking up the evidence under the heads already used in the preceding articles.

I. That the same root served originally for the ideas afterwards differentiated as "pledge," "promise," and "bet" or "forfeit," is undoubted,<sup>1</sup> and we may thus assume, *prima facie*, that the starting-point in Roman thought was the same as that of Germanic thought.

A. 1. (a) We have no direct evidence of a time when the pledgee was understood to have no personal action against the pledgor; but we have indications that such a principle once prevailed.<sup>2</sup> (b) As to the incidence of the risk, we may infer that, so far as bailee's risk was concerned, the classical law was just emerging from the stage in which there had been absolute responsibility;<sup>3</sup> and we can thus

<sup>1</sup> Παιγ- (παίγνυμι) was the root for *pignus*: Curtius, Griech. Eytmol., No. 338; accepted by Dernburg, 49; Jourdain, 86; Voigt, 236; we find the combination "pignori pepigisset," Gaius, IV, 147; Gaius' etymology quoted above (*pugnus*) is of course purely fanciful. For the "bet" or "forfeit" idea, there is voluminous evidence of *pignus* being the common term; full citations are given in Voigt, 255, 267; a few in Bachofen, 481; Jourdain, 86; Rudorff, 194. Rudorff, Dernburg, and Jourdain, in mentioning this usage, are apparently puzzled by it, and do not understand its connection with the pledge-idea. For the "promise" idea, *pac-* and *pacere* (from *παειν*?) show one line of development; but there is another, more significant, which shows how nearly the Romans escaped developing a *wadium*-promise by precisely the same path as the Germans, — the early practice of *deposito pignore certare* (Voigt, 276; Salmasius, 489; Jourdain, 90), in which the parties placed with the sequester (or private arbiter) a forfeit, which thus relieved them from furnishing personal sureties (compare the *wadium* usage), and was the reward of the winning party; and the other early institution of *legis actio per pignoris capionem* (Voigt, 250), which reminds us also of other features of the *wadium*-history. Moreover, the kinship of earnest-money and pledge again appear in the colloquial interchangeability of *arra*(*bo*) and *pignus* (Isidorus, in Bruns, 408; Salmasius, 581). Again, the close relationship, primitively, of personal and real suretyship are seen (Dernburg, 6; Jourdain, 3; Rudorff, Röm. Rechtsg., II, § 64), as in Germanic law; the personal surety is a corporal payment, and his liability is not inherited (Gaius, III, 120); there is an obscure but certain connection between *vas* (*vad-*), *præs* (*præd-*), *pleige*, and *pledge* (Salmasius, 741; Dernburg, 27; Mommsen, Z. d. Sav. Stift., VI, 71).

<sup>2</sup> First, though the personal action is recognized as surviving in the law as handed to us, yet it had so frequently to be mentioned by the Imperial source of law as available (C. VIII, 13, 8, A. C. 239; id. 30, 2, A. C. 240; C. IV, 10, 14, A. C. 294; C. VIII, 13, 24, A. C. 294), that the doctrine seems at that epoch still to have been questioned by some. Again, the pledgee had a choice, the pledge-right was to an extent exchangeable with the debt (Bachofen, 50; Dernburg, 20), so that the complete notion of collateralness seems hardly reached in the classical period. Finally, *pignus* is occasionally spoken of as "satisfaction," e. g. "*in vicem satisfactionis*" (Ulp. in D. 46, 5, 7), — a significant phrase.

<sup>3</sup> Of the jurists, only three seem to have expressed themselves: (1) Gaius, in D. 13,

the more readily accept the clear signs that it was just beginning to make the pledgor pay the debt in the case of accidental loss of the *res*,<sup>1</sup> and that in the same way the pledgor's liability for a deficit, on the sale or forfeiture of the *res* at default, was also just superseding his primitive non-liability.<sup>2</sup> 2. Finally, the pledgee's

6, 18, pr., seems to hold only to "culpa"; (2) Ulpian, in D. 20, 1, 2, says that "incommodi fortuito" is the debtor's risk; in D. 42, 5, 9, § 5, and 50, 17, 23, exacts of the creditor "non tantum dolum malum, verum culpa, quoque debet"; while in D. 13, 7, 13, § 1, he holds him for "dolus et culpa," also for "custodia," but not for "vis maior." (3) Paulus, in D. 13, 7, 14, holds him only to the care of "diligens paterfamilias"; in D. 22, 2, 6, he exonerates him from "pignoris deminutio," except in marine loans. This uncertainty, especially the fluctuation from the stricter responsibility of *custodia* (which included liability for theft), indicates a working away from some stricter standard; moreover, in D. 13, 7, 30, Paulus holds the pledgee liable for "vis maior" in a pledge seized on execution (Germanic *nam*), though not in a voluntary pledge, — indicating precisely the Germanic order of development, i. e. later survival of the strict responsibility in the former class. In the Imperial legislation, the earliest record (IV, 24, 5, A. C. 224) declares the pledgee liable for faultless loss, unless he proves "manifestis rationibus se perdidisse," — a clear case of the primitive transition-stage found in other laws. In the later legislation there is much fluctuation, but the law still appears as trying to overcome a tradition in favor of the stricter standards of "vis maior" and "custodia"; IV, 24, 6, A. C. 225, not for "fortuito casu"; ib. 7, A. C. 241: "dolo vel culpa"; ib. 8, A. C. 246: "si nulla culpa vel segnitia," exonerated; VIII, 13, 19, A. C. 293: "vim majorem . . . præstare necesse non habet, ita dolum et culpam, sed et custodiam exhibere cogitur"; Coll. leg. Mos. et Rom. X, 2, § 2: "dolus et culpa." In the time of Justinian (Inst. III, 14, § 4) it was still necessary to say "placuit sufficere . . . exactam diligentiam," so that "fortuitus casus" did not make the pledgee liable; and this use of "sufficere," which has troubled commentators (e. g. Moyle's Justinian, *ad loc.*), seems naturally explainable as directed towards the final remnant of the old tradition of strict responsibility. For the place of *custodia* as intermediate between *culpa* and *vis maior*, see Biermann's article. Wächter throws little light on the subject. Dernburg (151) inverts the real order of development.

<sup>1</sup> The earliest Imperial pronouncement finds the law in the later-middle Germanic stage, i. e. the pledgor liable for the debt unless the contrary is agreed: C. IV, 24, 6, A. C. 225: "[In case of fortuitous loss, the pledgee] nec a petitione debiti submovetur, nisi inter contrahentes placuerit ut amissio pignorum liberet debitorem." Later passages show the final stage by omitting this qualification; IV, 24, 9, A. C. 293: ". . . pignori-bus debitori pereuntibus, personalem actionem debiti reposcendi causa integram te habere"; VIII, 13, 25, A. C. 294: "servo qui fuerat pignori obligatus defuncto, debiti permanet integra causa"; VIII, 35, 3, A. C. 326: "Creditores enim, re amissa, jubemus recuperare quod dederunt." As late as Justinian's time it was deemed worth while to repeat this; Inst. III, 14, 4: "[In case of fortuitous loss, the pledgee is harmless,] nec impediri creditum petere." The necessity of proclaiming this so many times is good evidence of the persistence of a tradition to the contrary. The preceding stage of the law is almost certainly indicated by the passage of Pomponius (A. C. 150 *circa*), in D. 13, 7, 6, where he thinks that the pledgee must sell the *res*, provided the pledgor gives him a sufficient bond for the deficit, "invitum enim creditorem cogi vendere satis inhumanum est," i. e. by implication, he has nothing else than the *res* to look to for payment.

<sup>2</sup> In Pomponius' time the law was just emerging from the middle stage, i. e. in which an express agreement was needed to make the pledgor liable; Paulus, in D. 20,



duty to restore the surplus, though recognized in classical times by all, bears the marks of having been preceded by a contrary rule.<sup>1</sup>

B. We may now notice the marks of the process of curing the pledgee's defect of title. The Roman law does not sharply mark off that element of complete title which was furnished in Germanic law by the *auflassung* or *resignatio*; so that we are not able *a priori* to determine the method which would have to be chosen to supply the defect.<sup>2</sup> But we do know that the pledgee lacked full ownership, i. e. *dominium*, and we are prepared to find him endeavoring to obtain means of curing the defect of title. The history of his efforts seems substantially identical in features with the Germanic law.

a'. First, we find him cutting off the pledgor's right, and obtaining a complete right of disposition, by a process of repeated summons similar to that of Germanic law, and doubtless resting on the same theory.<sup>3</sup>

5, 9, § 1: "Pomponius autem in libro secundo ita scripsit: 'quod in pignoribus dandis adici solet [i. e. a special clause inserted], ut quo minus pignus venisset [i. e. brought at a sale] reliquum debitor redderet, supervacuum est, quia ipso jure ita se res habet, etiam non adiecto eo'" ; and Scaevola, in D. 46, 1, 63, puts a problem in which such an agreement appears. Gaius, too, in D. 12, 1, 28, finds it necessary to affirm that "creditor qui non idoneum pignus accepit non amittit exactionem ei debiti quantitas in quam pignus non sufficit." Moreover, the assertion of Modestinus (D. 2, 14, 3), "Postquam pignus vero debitori reddatur, si pecunia soluta non fuerit, debitum peti posse dubium non est, nisi specialiter contrarium actum esse probetur," could hardly have been made except in a community in which the idea of the independent survival of the debt was just becoming familiar. But it still remained necessary, in the third century, to get three Imperial pronouncements before the matter ceased to be questioned; C. VIII, 27, 3, A. C. 223: "Hypothecis vel pignoribus a creditore venumdatis, in id quod deest adversus reum vel fidejussorem actio competit"; ib. 9, A. C. 287: "[After a sale,] quod si quid deerit, non prohibemini etiam cetera bona jure conventionis consequi"; C. IV, 10, 10, A. C. 294: "Adversus debitorem, electis pignoribus, personalis actio non tollitur, sed eo quod de pretio servari potuit in debitum computato, de residuo manet integra."

<sup>1</sup> The phrase "si nihil specialiter convenit, . . . de superfluo competit actio" (C. VIII, 28, 20, A. C. 294), seems to imply that at that date a clause to the contrary was still valid; while Justinian's comprehensive law of A. C. 530 (VIII, 33, 3) makes no such qualification, i. e. the pure collateral-security idea will not allow such an agreement to stand. The express assertions of Paulus (Rec. Sent. II, 13), Ulpian (D. 13, 7, 24, § 2), and Papinian (D. 13, 7, 42) seem also to imply a necessity for removing a doubt; so also C. VIII, 28, 5, A. C. 294.

<sup>2</sup> It is to be noted, however, that the pledgor who fails to pay after cut off proceedings (Scaevola, D. 44, 3, 14, 5; Ulpian, D. 13, 7, 4), as well as the pledgor who inserts a forfeiture clause (C. VIII, 35, 1), is said *cessare*, i. e. to abandon,—the same idea as in *resignatio*, *auflassung*.

<sup>3</sup> Paulus, Rec. Sent., II, 5, 1: "ter ante denunciare debitori suo debet, ut pignus luat, ne a se distrahatur"; the *ter* appears also in the mention by Ulpian, D. 13, 7, 4; while

a". Next, we find the same purpose attained, as in Germanic law, by an express clause in the contract. But while in Germanic law there was no classification of the clauses, and they covered indiscriminately an appropriation by the pledgee or a sale by him or both, in Roman law the two types became distinct. (1) The *lex commissoria*, or forfeiture-clause, we know little about, except from the later mention of its prohibition.<sup>1</sup> (2) The *pactum venditionis*, *lex venditionis*, or sale-clause, is frequently mentioned as the only way by which the pledgee can obtain the power of disposition other than by the formal *denuntiatio*.<sup>2</sup>

It is to be noted that both the *denuntiatio* and the *lex* or *pactum* are almost invariably referred to as "allowing" (*licere*) the pledgee to do what he otherwise could not do, i. e. are aiding and curing his defect of power, and thus, as in Germanic law, the process is in no way related to the later compulsory (*debere*) sale for the pledgor's protection.

a". Abuse of this *lex* or *pactum*. The abuse of these clauses for the purpose of evading the duty of returning the surplus was soon resorted to; and the Imperial aid was invoked to prevent it.

in Paulus, Rec. Sent., II, 13, 5 (dealing with the *fiducia* form), and in C. VIII, 27, 9, A. C. 287, *sollemniter* is used instead; the process evidently being a formal summons kindred in nature to the Germanic one. The *proscribere* of D. 47, 10, 15, § 32, is perhaps the same process.

This *denuntiatio* is often mentioned by the Emperors as the essential for obtaining a power of disposition: e. g. C. VIII, 13, 10, A. C. 290; C. V, 37, 18, A. C. 293; C. VIII, 27, 9, A. C. 287. Moreover, its droitful effect is seen in the fact (Ulpian, *semble* D. 13, 7, 4; Paulus, R. S., II, 13, 5) that the sale was lawful, after *denuntiatio*, even though the contract forbade a sale; though C. VIII, 27, 7, A. C. 238, seems *contra*.

<sup>1</sup> The clause in ordinary sales was: "Si ad diem pecunia soluta non sit, fundus inemptus sit"; thus it would apparently run for pledges: "Si, etc., fundus creditori sit," or (C. VIII, 35, 1) "nisi intra certum tempus pecuniam debitor solveret, fundum cessurum se creditori."

<sup>2</sup> It is referred to by Labeo (D. 20, 1, 35), Ulpian (D. 13, 7, 4), Gaius (II, 64), and C. VIII, 27, 8, A. C. 239, apparently as a common thing, and in C. IV, 24, 4, A. C. 223, it is expressly termed "*pactum vulgare*." It clearly appears to have had precisely the same purpose as the Germanic *auflassung*-clause, i. e. to cure a defect of title; e. g. Ulpian, in D. 13, 7, 4: "Si convenit de distrahendo pignore . . . , non tantum venditio valet, verum incipit emptor dominium rei habere"; Pomponius, *ib.* 8, § 4: "De vendendo pignore in rem pactio concipienda est, ut omnes contineantur"; moreover, in C. VIII, 27, 7, A. C. 238, the pledgor is told that, if he has any charge of fraud against the creditor, it is a personal claim only, and the buyer's title cannot be disturbed.

That this right of sale became implied apart from express authority is asserted by Ulpian (D. 13, 7, 4); yet Paulus (R. S. II, 5, 1) looks the other way. The clause at any rate continued to be usual.



In the third century, and within a year of each other, both *lex commissoria*<sup>1</sup> and *lex venditionis*<sup>2</sup> were declared not to prevent the pledgor from claiming a restoration of the surplus. The efforts to abuse the *lex commissoria* seem, however, to have continued,<sup>3</sup> and Constantine was obliged, in the next century, to prohibit its use entirely;<sup>4</sup> and the compulsory sale thus introduced is found systematically arranged for in the legislation of Justinian.<sup>5</sup>

Thus, in Roman as in Germanic law, the development of pledge-law appears to include two main and interacting processes, (A) the progress from the forfeit-idea to that of collateral security, and (B) the expedients made necessary to cure the pledgee's defect of title; the latter being in the course of time employed to evade the final requirements of the former.<sup>6</sup>

<sup>1</sup> A. C. 222, C. VIII, 35, 1: "Qui pactus est, nisi intra certum tempus pecuniam quam mutuam accepit solveret, cessurum se [sc. quidquid] creditoribus, hypothecæ venditionem non contraxit [i. e. the creditor has not substituted a sale to himself instead of the pledge], sed id comprehendit quod jure suo creditor in adipiscendo pignore habiturus erat [i. e. he has merely got what as pledgee he would in any case have]. Communi itaque jure, creditor hypothecam vendere debet [i. e. and account for the proceeds]."

<sup>2</sup> A. C. 223, C. IV, 24, 4: "Pactum vulgare, quod proposuistis, ut si intra certum temporis pecunia soluta non fuisset, prædia pignori vel hypothecæ data vendere liceret, non admittit debitori adversus creditorem pignoratitiam actionem [i. e. for the surplus]."

<sup>3</sup> Paulus, in D. 13, 7, 20, § 3: "Interdum soluta sit pecunia, tamen pigneraticia actio [for the surplus] inhibenda est, veluti si creditor pignus suum emit a debitorum." Compare also Marcian, in D. 20, 1, 16, § 9, and Marcellus, D. 13, 7, 34. Papinian, *Fragm. Vat.* 9, taking practically opposite views as to whether a pledgee could *buy* the *res* from the pledgor. By comparing these three with the earlier opinion of Pomponius (D. 13, 7, 6) that the pledgee not merely *may* sell, but *must* sell, provided the pledgor gives a bond (*cautela*) for any deficit of proceeds, we may clearly infer that in the preceding century an opinion had been growing towards compelling the pledgee to sell and account for the surplus, and that a clause of purchase by the pledgee was being used to evade that duty of restoration.

<sup>4</sup> C. VIII, 34, 3: "Quoniam inter alias captiones præcipue commissoriæ legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri."

<sup>5</sup> C. VIII, 33, 3, A. C. 530, with rules not unlike those of our own law of to-day. The contrast between the old sale and this new kind is brought out in the passage *supra* of Pomponius, where he says that though the old and customary clause reads "licere," yet nevertheless "cogendus es vendere."

<sup>6</sup> The forfeit-idea, and the analogy of its development in other laws, seem thus to supply a simple solution for a topic that has long vexed students of Roman law. Apropos of this problem, a passage of M. Jourdain (561) is worth quoting: "Si la *lex commissoria* soulève des questions d'un intérêt incontestable, qui appelaient l'attention des jurisconsultes, philosophes, et praticiens, il faut reconnaître que ceux-ci ont répondu à l'appel avec empressement. Romanistes, civilistes, canonistes, sont entrés en lice. . . . Tous s'y soient donnés rendez-vous comme en un champ clos, les uns pour fournir simplement quelques passes plus ou moins brillantes, les autres

II. Using, as before, the English word "hypothec" to signify merely the retention of the *res* by the pledgor, we may now proceed to ascertain the place of this species of transaction in Roman pledge-law.

1. *a.* First, the generic word is the same, and the distinction is expressed in classical times merely by a different verb.<sup>1</sup>

*b.* The pledge with pledgor's possession was in existence as far back as we find *pignus* at all.<sup>2</sup>

*c.* Its character seems to have been simply that of a postponed pledge.<sup>3</sup>

*d.* The problems about surplus and deficit, and the clauses of forfeiture, etc., seem to have occurred equally for the hypothec.<sup>4</sup>

pour combattre à l'outrance. Il est résulté de là une littérature juridique extrêmement abondante, — plus variée qu'on ne pourrait le croire en pareil sujet, et (honni soit qui mal y pense !) quelquefois divertissante."

<sup>1</sup> The authorities for this have already been given. The commonest early term was *opponere*, as distinguished from *deponere*, coupled with *pignus*. Later, the verb *obligare* was employed, and *bona pignori specialiter aut generaliter obligare* expressed the two kinds of hypothec, — general (*omnia bona presentia et futura*), and specific: Salmassius, XIII, XIV; Voigt, 240; e. g. C. VIII, 16, 1 and 4; 17, 4 and 6; 27, 9; D. 20, 4, 2. For the public-land leases (*prædiatura*), the term was *subdare* or *subsignare*: Bruns, 398, 146; Dernburg, 30, 33, 39. In the post-Justinianean Latin of the Germanic invaders *obligare* was the common term (e. g. Köhler, 279), and in the law-Latin of mediæval South France *obligation* means hypothec.

<sup>2</sup> The modern investigators are practically at one on this point: Voigt, 245 (it goes back "to the earliest times of Roman antiquity"); Cuq, 634; Dernburg, 30, 67; Bachofen, 631, 7; Jourdain, 57, 90, 166; Rudorff, 201; though some of them do not put it so broadly, and merely concede that the thing existed long before the Greek name was applied to it. The earliest clear record seems to be that in Cato's *Re Rustica*, c. 146. The forms of action which successfully came to protect the pledgee were the Salvian interdict (for goods in a lessee's hands, pledged for rent, etc.), the Servian action (for such goods when wrongfully transferred to a third person), and the quasi-Servian (for all others): Dernburg, 51; Bachofen, 27; Jourdain, 97; Voigt, 263 (who puts the date of the first and the second as under Augustus, and of the third as under Trajan). For the later application of the Greek name *hypotheca*, see *post*.

<sup>3</sup> "L'entrée en possession est remise à une époque ultérieure, au jour de l'échéance si le créancier n'est pas payé": Cuq, 634; it was "till the default in the obligation in question to remain in the debtor's hands, . . . the pledgee having an expectancy of possession"; Voigt, 252. The early formula in Cato, *supra*, shows this: "Donicum solutum erit, . . . pigneri sunt." In short, the keeping custody *precario* of a *pignus* (D. 13, 7, 35; § 1; 43, 26, 6, § 4) was the hypothec-form. There seems to have been, therefore, a documentary clause specifying this: "Creditores qui, non reddita sibi pecunia, conventionis legem ingressi possessionem exercent, vim quidem facere non videntur": C. VIII, 14, 3.

<sup>4</sup> See the passages *ante*, where the two forms of *pignus* are indifferently the subject. For the debtor's-possession form, strong evidence is furnished by the Servian action, which originally (Bachofen, 29 ff.) was *in rem* and got title, not merely possession; this would leave no chance for the pledgor to recover the surplus. Again, the Cato passage



e. The pledgee obtained a title good against third persons.<sup>1</sup>

f. A second hypothec is already allowable in the stage when the law first reaches us; but there are indications of an earlier stage when, as in other primitive laws, it was not allowable.<sup>2</sup>

2. As in Germanic law, the peculiar application of the pledge-possession pledge primitively was to contingent liabilities;<sup>3</sup> i. e. liabilities as to which there was as yet no default and nothing (e. g. a loan) for which the creditor could demand a present counter-use; thus the Heusler theory is here again confirmed by the presence of this peculiar feature, which we have found in so many of the primitive systems.

III. The Sale-for-Repurchase form is represented in Roman law by the *fiducia*. This was a transfer of title to the creditor by mancipation, or by *in jure cessio*, on the terms that the creditor should restore it on payment of the debt. The German jurists will probably never agree as to the nature of the debtor's right to restoration, — whether it was a contractual or a real right, and whether it was of civil or of prætorian origin.<sup>4</sup> The natural view

is clear: "Si quid deportaverit [de fundo], domini esto," i. e. forfeited. Moreover, the *res uxoria* hypothec was *estimata*, as in Greece: *Fragm. Vat.* 94-121; see *ante*, p. 20, and X. 404, for the significance of this.

<sup>1</sup> This seems to be conceded by all. It is noticeable that in the earliest time we have this prohibition against transfer expressed in the contract; Cato, *ubi supra*: "Ne quid eorum de fundo deportato."

<sup>2</sup> Thus, Paulus (R. S. II, 13, 3): "Debitor . . . aliis [sc. than the creditor], si velit vendere, potest ita, ut ex pretio ejusdem pecuniam offerat creditori atque, remancipatam sibi, rem emptori præstet"; i. e. the very process which we have seen in other primitive systems to be the accompaniment and mark of the notion that the pledge-title is exclusive of any others; and the transaction described *ib.* 8 looks in the same direction. For other instances of the evident naturalness of this notion that the second creditor should pay off the first, see Jourdain, 465-479.

<sup>3</sup> The three chief types were (1) the landlord's hypothec against future default of rent of farm (rural) or house (city); (2) the State's claim for the rent of public land leased (*prædiatura*); (3) the wife's family's claim for restoration of *dos* on future divorce or death. The first is the subject of one of the earliest recorded instances; Cato, *De Re Rustica*, c. 146: "Domicum solutum erit aut ita satis datum erit, quæ in fundo illata erunt, pigneri sunt." The clearest proof that primitively this was the first situation in which the hypothec was employed is seen in the fact that the earliest remedies (the Salvian interdict and the Servian action) covered this situation only (see *ante*, p. 30), and that it was worked out through an implied (*tacita*) contract (D. 2, 14. 4). The second type above was also one of the earliest recorded kind. Finally, these three types are apparently the first cases in which the law raised an implied hypothec without express contract, — another parallel (except for the second) with other systems. For the Cato passages and similar ones, see Voigt, 253; Puchta, § 193; Bachofen, 7; Dernburg, 65, 295. For the *prædiatura* passages, see Dernburg, 33 ff.; Jourdain, 57.

<sup>4</sup> Compare Degenkolb, Geib, and Heck, *ubi cit.* Géný, *Etude sur la Fiducie* (1885), and Oertmann, *Die Fiducia*, Sav. Stift. (1890), have not been accessible to the writer.

would seem to be that the transferee, like our mortgagee, obtained ("uti lingua nuncupassit") a conditional title; i. e. until default he could not transfer a good title, and on payment at maturity the debtor's claim for restoration was real, not merely personal.<sup>1</sup> There are also hints, though not proofs, that it was by the Romans put to the same uses as by the Germans, and that its history was similar.<sup>2</sup>

A difficulty to be met, however, is, Was the *fiducia* still in classical times a common form of pledge? and if it was, what room was there for the *hypotheca*, and why is *hypotheca* the only term other than *pignus* used in Digest and Code? The answer to this must be that the *fiducia*-form did not die out, that it lasted down to and beyond Justinian's time, and that it is not mentioned in Justinian's compilations simply because Tribonian and his Greek assistants, by a systematic use of the erasing pen, substituted their own word *hypotheca* for the classical term *fiducia* wherever it occurred in the passages they collated.<sup>3</sup>

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<sup>1</sup> As evidence of this, the sale of a *fiducia* apparently needed the formal process of *denuntiatio* as much as the *pignus* (Paulus, R. S. II, 13, 6); and we several times hear of a *fiducia*-sale not being valid, *fiducia* here being coupled with *pignus* (ib. 5; Id., I, 9, 30); moreover, the *fiducia*-formula found some years ago in Spain contains the power-of-sale clause (Bruns, 251; Degenkolb, *loc. cit.*), which would be meaningless if the power otherwise existed.

<sup>2</sup> Its original use seems to have been to get the *res* into the hand of a friend, from whom it could be later reclaimed (*fiducia cum amico contracta*, Gaius, II, § 60; Boethius, in Bruns, 400). Then pledgees found it useful; and that they used it, as in Germany, to evade the surplus-restoration is indicated by the fact that Paulus (R. S. II, 4; II, 13) expressly mentions the *fiducia*-pledgee's duty to restore, but not the *pignus*-pledgee's duty, — the inference being that the latter was by then undisputed, the former not; and the Spanish formula has a clause allowing the *fiducia*-pledgee to sell for a nominal sum, — indicating a further effort to evade the duty of surplus-restoration. By the end of the classical period the *fiducia* seems to have been brought under all the rules of pledge, so far as they prevented the pledgee from getting any special benefit from using that form (just as our conditional-sale form of mortgage is to-day); and hence we find Gaius (II, 60) speaking of *fiducia* as governed by the rules of pledge ("jure pignoris"), and the phrase "*pignus vel fiducia*," as including the two typical forms, is common. It was this assimilation of *fiducia* to the rules of pledge that furnished the invading Lombards with *fiduciare*, etc., as their common phrase for the pledge of land; just as barbarians invading England in the 1800's would have found the conditional-sale used as the common form, and yet in effect treated as a pledge only.

<sup>3</sup> The argument for this radical proposition involves two steps: *a.* That legally and practically the *fiducia*-transaction and the *hypotheca*-transaction were interchangeable, so that a legal proposition would remain valid after the substitution of terms; *b.* That, this being so, the verbal usage of the surviving sources is explainable only on this hypothesis of a textual substitution.

*a.* (1) It has just been pointed out that legally the *fiducia* was governed in classical times by the rules of *pignus*. Now, furthermore, the *fiducia*, being peculiarly appro-



#### IV. Lack of space forbids any examination here into the development of the *vifgage* principle in Roman law, — the form in which

prate for immovables (*res mancipi* at least), had come to be in practice employed for land by leasing it back (*precario* or *conductione*) to the pledgor (Gaius, II, 60) precisely as with our own mortgage; so that Justinian's Greek lawyers found in *fiducia* a transaction precisely like their own *ὑποθήκη* of later times, i. e. (in the phrase of the Institutes) "proprie" a thing kept by the pledgor, "maxime" if not a movable. It was thus perfectly possible for them to use either *hypotheca* or *fiducia* of the transaction.

(2) The chief objection to supposing that the *fiducia* survived throughout classical times has been the necessity for *mancipatio* in its creation; as *mancipatio* was not abolished till Justinian's time (C. VII. 31, 5, A. C. 531), and as *pignus* (it was assumed) could only apply to pledgee's possession, it would be absurd (it was supposed) to believe that the Roman financial world could do any important part of its business by a system of security (on land) requiring either the cumbrous *mancipatio* or else possession by the pledgee; hence *fiducia* is almost always thought of and spoken of by modern writers as one of the antiquities of Roman law, dying out before classical times. Paulus' chapter on *fiducia* might have been enough to cast doubt on this, for Paulus lived at the end of the classical times; but when we once discard the notion that *pignus* required the pledgee's possession, and realize that it applied equally to the pledgor's possession and to realty, it is easy to understand that the needs of a developed commerce were amply met by *pignus* and *fiducia* together. Moreover, it is highly probable that the cumbrousness of actual *mancipatio* was not a feature of the *fiducia* even in classical times; for (quite apart from the opinion of some that *traditio* would suffice, Dernburg, 10) it would seem that *mancipatio* could be accomplished by the mere delivery of a document with witnesses, reciting *mancipatio* (Köhler, 81; Dernburg, 94; compare the "obligatis cautione mancipiis," in the *Lex Rom. Burg.*, found in Cod. Hermog., Krueger & Stud. III, 244), — a process exactly analogous to the symbolic *traditio per cartam* in Germanic law, and in fact the very model of that development for the Lombards among whom it was earliest found. Thus there is no reason why we should hesitate to believe in the common use of *fiducia* in classical and later Roman periods.

b. Why, then, *must* there have been a substitution? (1) In all the Digest and Code passages selected by the Tribonian Commission, though the word *hypotheca* occurs (possibly) two or three thousand times, the word *fiducia* (as applied to a mortgage) is wanting; while in all the other sources of Roman legal usage which have survived to us independently of the Justinianean jurists, the words *fiducia* and *pignus* are alone used, and the word *hypotheca* is not used at all. For the first of these propositions, we have the authority of Professor Gradenwitz, of Königsberg (a chief collaborator in the exhaustive Concordance now in preparation), who has recently, with great courtesy, furnished for this article the nine citations of *fiducia's* occurrence, viz. I, 2, 2, § 47, § 49 (*bis*); 3, 5, 30, § 6; 22, 3, 14; 38, 17, 2, § 15; 40, 12, 41, and 43; 47, 10, 32, — in none being used in the present sense; Salmasius had already asserted this and Révillout (*Oblig. en droit égypt.*, 233) indorsed this. For the second proposition, Salmasius gives his authority, and Révillout indorses it for the since-discovered documents; and the present writer's examination of the extra-Justinianean sources confirms it. These outside sources are of two sorts: (α) the classical ante-Justinianean writings, chiefly Gaius, Paulus, and the Vatican Fragments (as well as the sepulchral inscriptions in Bruns, 306, 307); here the word *fiducia* occurs 33 times (*teste* Professor Gradenwitz), and the word *hypotheca* not at all (except in the Greek form); moreover, Paulus and Gaius, the chief authors, are represented also in the Digest, and use there the word *hypotheca* (Paulus, in D. 20, 3, 4; 20, 6, 11; Gaius, in D. 20, 1, 4, and 15), — a circumstance almost conclusive in itself; (β) the legal documents of the Lombards and Ostro-

the pledgee is required to set off or "reckon" the profits of the *res* against interest or capital, or both; it must suffice to say that

goths, who settled in Rome and Italy just before Justinian's time and learned the Latin that they found there, — these also not using *hypotheca*, but using *fiducia* and *fiduciare* freely, almost exclusively (Dernburg, 94; numerous quotations in Köhler, Pfandr. Forsch. 80-86, ranging from the 500's to the 800's; also in Ducange, s. v., and Val de Lièvre, Launegild, 114, note 1, down to the 1100's), a circumstance equally strong. (2) The peculiar phrase, *pignus vel hypotheca* (or *p. sive h.*, or *p. h.-ve*, or *p. et h.*), used throughout the Digest and the Code to cover all kinds of pledge-transactions, is in these extra-Justinianean sources replaced by *pignus vel fiducia* (for the classic lawyers, see Paulus, R. S., I, 9, 8; II, 13, 4; II, 17, 15; III, 6, 16; V, 1, 1; V, 26, 4, and Consult. Jurisc. 6 § 8, quoting Paulus, II, 17, 15, — the same Paulus in the Digest saying "*p. sive hyp.*," D. 20, 6, 11; for the Lombard usage, see Köhler, 84, 86). The result of these two sets of facts, (1) and (2), is that the Blackstones and Storys of Roman law appear, in MSS. independently transmitted, as knowing only *fiducia*, while in MSS. collated and excerpted by the Tribonian Commission they know only *hypotheca* in similar contexts; and that in the former the same persons subsume all pledge-forms under *pignus vel fiducia*, but in the latter under *pignus vel hypotheca*; the inevitable inference is that in the latter there has been a simple but systematic textual substitution. The harmony of later Lombard usage with the former texts confirms to completeness their title to represent true Roman usage, and indicates the Byzantine text as a spurious one. (3) The *actio hypothecaria* was simply the Justinianean name for the *actio Serviana* (as is shown not only by Inst. IV, 67, "Item Serviana et quasi-Serviana, quæ etiam hypothecaria vocatur," but also by the way of using the phrase in the Digest passages, D. 10, 4, 3, § 3, "in rem actione, etiam pignoratitia serviana, sive hypothecaria," D. 16, 1, 13, § 1, "cum quasi-serviana, quæ et hypothecaria vocatur," C. VI, 43, 1, "utilem Servianam, id est hypothecariam," — a suspicious phraseology, which by the canons of interpolation suggests a doctoring of the text in the manner of a glossarist). Now the Servian actions were originally *vindicationes*, i. e. petitory, droitural, or *in rem*, while the *pignoratitia* originally was possessory only (Bachofen, 29 ff.), which makes it plausible that the Servian actions were those which originally supplied the *fiducia*-pledgee's remedy; and the occasional phrase "pignoratitia Serviana" indicates just the complementary relation which "pignus fiduciave" represented. (4) Certain passages, otherwise inexplicable, become on the above theory perfectly clear. To take two examples only: (α) Marcian is made to say (D 20, 1, 5, § 2), "Inter pignus autem et hypothecam tantum nominis sonus differt." On the ordinary theory of *pignus*, this is wholly untrue; on the simple theory that *pignus* is a generic term, it is inexplicable; but on the theory of substitution, this is a natural and accurate statement of the classical law. (β) In C. VIII. 27, 2, A. C. 223, of "hypothecæ vel pignori," it is said that in a certain case "precario debitor possidet"; now it is impossible to speak of a debtor holding a *hypotheca*, on the ordinary theory, "precario"; but, said of a *fiducia*, this is perfectly correct, as also of a *pignus* retained (D. 43, 26, 6, § 4). (5) Cicero uses *ὑποθήκη* twice (Jourdain, 168; Dernburg, 64), once in Atticum, II, 17, again in Familiares, XIII, 56; in the former he jokingly asks Atticus to bring him a pledge of Pompey's conduct, saying, "ὑποθήκας afferes," — showing that *he* used it in its then generic Greek sense including pledgee's possession; there is a similar example of 68 A. C. in Bruns, 220. Again, Scævola's case of the Greek epistle, in D. 20, 1, 34, uses *ὑποθήκη* in the same sense of pledgee's possession; and Scævola goes on to discuss the case exclusively in terms of *pignus*. Now, first, it is impossible that Scævola, living at the time of Gaius, and barely before Ulpian, Paulus, and Marcian, could have used *ὑποθήκη* in this sense, and that the others could not immediately have used the borrowed word in another sense; and, secondly, that Scævola would have gone on to discuss the case in terms



there is no indication that the development was essentially different from that of Germanic law.<sup>1</sup>

of *pignus* if there had then been in use among the classical jurists the very same word Latinized. (6) As late as Theodosius' time a Code passage (VIII, 13, 6, A. C. 439) speaks of the wife's hypothec as "*jus pignoris*"; while in Justinian's own decrees this is spoken of as "*jus hypothecæ*" (C. V, 3, 19; V, 9, 8, § 4; VI, 61, 4; VIII, 18, 12; Inst. IV, 6, 29); so too, *semble*, of the minor's hypothec on the guardian's property ("*pignoris titulo*," in 314 A. C., C. V, 37, 18; "*hypothecis*," in A. C. 531, ib. 26), — indicating that there never was any actual usage of *hypotheca* at Rome, and that only among the Constantinopolitan Greek lawyers around Justinian was it ever an accepted word. (7) Any other than the substitution-theory requires us to fix some time for *hypotheca* coming into use; now it could not first have come into use in post-classical times (i. e. after 250 A. C.), because by hypothesis the classical lawyers employ it; and it could not have come into use before then, since both Gaius and Paulus, representing the 2d and 3d centuries, in complete treatises ignore the word; it is thus left unexplained, and we find ourselves in a hopeless dilemma. (8) The chief evidence against the present thesis seems to lie in the fact that Isidorus (V. 25, 22–24, Bruns, 408) mentions in the same paragraph all three words, *pignus*, *fiducia*, and *hypotheca*. This seems to be the only recorded instance of the sort; and it is easily explainable that Isidorus, writing in the 600's, with *fiducia* used by the people about him, and *hypotheca* before him (presumably) in the Justinianean texts, could do nothing less than mention all three. A passage of this sort before the time of Justinian would have much significance; after that time it has none at all.

The hypothesis of the textual substitution of *hypotheca* for *fiducia* was first advanced by the French monk Salmasius, in his *De Modo Usurarum*, in 1663 (cc. XIII, XIV); the arguments employed by him, in brief form, are those of *a* (1) and *b* (1) above. Since his time no one seems to have noticed it, except Révillout (*Oblig. en droit égypt.*, 233), who points out that the discovery of the text of Gaius and the Vatican Fragments, since Salmasius' time, have only confirmed his theory. How feasible and credible such a systematic interpolation is need not be explained to the student of Roman law.

<sup>1</sup> Space must be taken, however, to register a protest against the orthodox usage of the word "antichresis" as signifying a pledge in which profits and interest balance each other, i. e. in which contingent profits are (not set off against a definite interest-rate, but) treated as equivalent to interest. Though the duty of the pledgee to set off the profits first against interest, and then against principal, is frequently mentioned, there was no specific Roman word either for this transaction or for the transaction of reciprocal balancing (e. g. C. IV, 32, 17). There are, however, two passages in which the Greek word *ἀντίχρησις* appears; Marcian, in D. 13, 7, 33: "*Si pecuniam debitor solverit, potest pigneraticia actione uti ad recipiendum ἀντίχρησιν; nam cum pignus sit, hoc verbo poterit uti*"; Id. in D. 20, 1, 11, § 1: "*Si ἀντίχρησις facta sit, et in fundum aut in aedes aliquis inducatur, eo usque retinet possessionem pignoris loco, donec illi pecunia solvatur, cum in usuras fructus percipiat . . . ; itaque si amiserit possessionem, solet in factum actione uti.*" Now *χρησις* meant in Greek a loan, and hence *ἀντίχρησις* was (not a reciprocal use, but) a reciprocal loan or lease; i. e. the transaction is not primarily a pledge at all; the lessee of the house or farm has merely a subsidiary lien on it for the return of his money; and the whole transaction plays practically no part in the history of pledge-law. Salmasius (618, 629) has pointed this out for Roman law; but it is worth noting because in several other systems the same type of transaction recurs. Thus, in the Chaldean documents there are a number of these reciprocal leases, distinguishable from true pledges by the circumstance that the preliminary recital of a debt is lacking (Révillout, *ubi supra*, X, 413); again, in French custom, the royal lands were leased out for a sum total in advance, which vir-

Looking, then, at the Roman law in the light of the forfeit-idea, and of the analogy of other laws, there seems to be at least nothing inconsistent with the supposition that the development was similar, and much that indicates, if it does not prove, a similarity in the main features. The true strength of the evidence seems to be this, — that if the primitive notion of *pignus* involved (as seems entirely clear) the triple bet-pledge-promise notion, and therefore conceived the pledge as a forfeit, there must have been a development, in some way or other, from that to the collateral-security idea; and as we find certain transition-marks common to Roman and to Germanic law, we may naturally believe that the progress was accomplished in much the same way. One must, to be sure, approach the field of the Romanists with the diffidence of a mere licensee, and at one's peril; but the temptation to advance a theory in the present case is extreme, and one can only apologize in the language of the genial and acute old monk who was the first to suggest the true key to the Roman development: "Scio quantum hæc a communi sententia dissideant; sed si qui nostram non probabunt, afferant meliora et contra scribant; ita melius veritas elucescet."<sup>1</sup>

#### 10. FRENCH LAW.

The development of the French law as a whole is, as may be imagined, by no means easy to trace; for though in the northern regions the direct building up on the basis of primitive Germanic ideas is clearly apparent, the southern customs are overlaid everywhere by the advanced form of the Roman law, and in early

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tually, by its interest, paid the rent for a number of years (known as *engagement*; see *post*); and the *convadium*, *contreband*, of some documents (Kohler, 89, 92) seems to be the same transaction. So in Anglo-Norman law the "beneficial lease" (Pollock and Maitland, *Hist. Eng. Law*, 111, 121) apparently served the same purpose. The key to the situation is the economic relation of the parties; if the land-owner is in the weaker situation, the transaction will be a pledge; but if the money-possessor is in the weaker situation (e. g. if the opportunities of direct mercantile investment are less available and profitable than those of the cultivation of a rich soil), he will prefer to invest by leasing land and taking the profits in lieu of interest; thus, in an Irish case of 1804 *Molloy v. Irwin*, 1 Sch. & Lefr. 310, the land-owner advertised a lease on the terms that the lessee must lend him a sum of money. The separateness of this type of transaction must be noted, because it illustrates, like the use of the mortgage form in France and Japan (*ante*, X., 412) to evade the feudal prohibition against perpetual sales, the necessity in such matters of refusing to be misled by mere forms and of going beneath to learn the real transaction.

<sup>1</sup> Salsmasius, 632.



modern times the original lines in the complex mass of inter-related notions are not easily to be followed. Lack of space peremptorily forbids any attempt to do so here. It must suffice to point out that the problem itself may be simply stated; for it involves necessarily three processes: (1) the tracing of the pure Germanic forfeit-idea in the northern regions down to, say, the 1400's; (2) the detection of the extent of Roman influence in the southern regions; and (3) the analysis of the resulting conditions down to the 1800's, when the distinction between the *pays de nantissement* and the other region was abolished.<sup>1</sup>

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<sup>1</sup> The acute and industrious work of Franken (1879, Franz. Pfandrecht im Mittelalter) is, it must be said, on the subject of landed security extremely unsatisfactory. The cardinal thesis which he champions is that the two types of pledge with and without pledgee's possession ("old" and "new" *Satzung*, in Germanic law) are here represented by "*engagement*" and "*obligation*" (2, 7, 98), and that the former is essentially nothing but a "usufruct" ("*niessbrauch*," "*nutzungsrecht*," 99, 140, and *passim*); and the whole problem is worked out on those lines. It is impossible here to attempt to point out the specific objections to his arguments. But leaving aside such defects of method as the practical ignoring of the radical dissimilarity of the northern and the southern customs, the beginning with the customaries of the 1400's (instead of going back to purer Germanic origins), and the placing his chief reliance on the thoroughly Romanized Bouteiller and the more or less suspicious Beaumanoir,—quite apart from these *a priori* reasons for doubting his results, one particular fact must here be pointed out as practically vitiating the main results; it is that the word "*engagement*," taken by the learned author as the typical word for pledgee's possession, in fact has a different meaning, and was not used in the sense of "pledge," if at all, until modern times, and then rarely. It is not merely that Franken, in his chapter on terminology, gives no reference (28) to any source defining it as "pledge"; it is not merely that he quotes passages in which it cannot possibly have that meaning (e. g. 103, where the singular rule would be laid down by Beaumanoir that a pledgee must give surety that he will return the pledge, or else the money-borrower will not let him take it); it is not merely these and other minor discrepancies that lead to the above conclusion; it is that the early French law dictionaries and treatises, almost without exception, define "*engagement*" as a bailment of land, of a sort higher than a mere lease and yet short of an ownership, the common example being the lease of the royal domain in return for a sum advanced by the lessee; and only subsidiarily do some authors speak of a pledge-meaning. E. g. Richelet, Dictionnaire; orig. ed. 1680, then 1719, 1728, etc.; s. v. *Engagement*: (1) "*Aliénation pour un temps*; [ex.] on ne peut posséder les biens du Domaine que par engagement (2) l'action d'engager; (3) attachement; (4) contrat, obligation; (5) ce qui est mêlé"; s. v. *Engagiste*: "*Celui qui tient par engagement quelque domaine ou quelques droits du Roi ou d'autre* [ex.] Un engagement des aides. Celui qui a un bail à longues années n'est qu'un engagiste." (The Latin bracketed definition of "*oppigneratio*," etc., is inserted by later editors.) Again, De Ferrière, Dict. de Droit et de Pratique, 1778: "*Engagement*: signifie [1] en général, obligation que l'on contracte verbalement ou par écrit de faire ou de donner quelque chose. [2] Il signifie aussi quelquefois une aliénation qui se fait pour un temps. Les biens de Domaine ne se possèdent en pleine propriété; ce ne sont que des engagements. Les baux emphytéotiques ne sont que de simples engagements. [3] Enfin, le terme d'engagement signifie une tradition actuelle d'un héritage

It would seem, then, that there are evidences in nearly a dozen different systems of law that the progress has been from a primitive forfeit-idea to a later collateral-security idea. In some systems only one stage of the development is represented; and in most of them the extant evidence exhibits some of the various distinctive marks of the progress much more fully than others. We are perhaps entitled, however, in such cases, to use our knowledge of one type of development, where it is fully established, to enable us to supply the gaps in another system where certain of the same distinctive marks reappear; for the law too (in the words of a French scholar) has its paleontology, and from a knowledge of the general type it may often supply certain missing details.

It is not the purpose here to make further generalizations from

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pour en jouir par le créancier jusqu'à l'actuel et parfait paiement de la dette pour laquelle l'engagement a été fait, afin que les fruits de l'héritage tiennent lieu de l'intérêt de l'argent; v. antichrèse"; and s. v. Antichrèse, he tells us that it "n'est pas une vente mais un simple engagement." If one will further compare the appropriate passages in Ragueau (*Dictionnaire du Droit Français*, orig. ed. 1583) and Loysel (*Institutions Coutumières*, orig. ed. 1607), and the chapters e. g. of Beaumanoir on "Bail" and "Gage," and of Pothier on "Louage" and "Hypothèque," it will be apparent enough that "engagement" meant and was used originally and commonly just as Richelet says, "aliénation pour un temps," a long lease as distinguished from a sale; that so far as it was ever applicable to a minor form of "gage," it was as a generic word which merely included the "gage" as a species; that this use was wholly subsidiary and occasional, and in ordinary use the "engagement" was dealt with under "bail" and not under "gage"; and that "nantissement" and "gage" were the ordinary words in the Beaumanoir period (e. g. B. LXVIII, 10, Loysel, § 483) for the transaction with pledgee's possession. It is thus easy to see how Franken, by taking as the typical word a term meaning a sort of "bail," "louage," or lease, is able to assimilate the pledge to a usufruct, and also how incorrect his results would thus become as representing the real doctrines of pledge. It is much as though he had undertaken to investigate the English law of debt; and, having found that the debts of a bank to a certain class of customers were known as "deposits," had taken all the passages in which the word "deposit" occurred and expounded our theory of debt in the light of the generic term "deposit"; what he would give us would be the law of bailment, not of pledge; and his discovery of "engagement" as occasionally used to cover a kind of "gage," and the erection of a theory of "gage"-law upon this abnormal usage is as little satisfactory in its results. The authority of Franken's treatise (unfortunately uncompleted), the important bearing of the subject on the Norman mortgage, and the great usefulness of the remaining portion of his work (on movable property, the *wadium*-promise, etc.), must be the excuse for here pointing out the reasons for distrusting his analysis of the land-gage. It need hardly be said that our attitude towards the history of the Norman (and therefore the English) mortgage will be radically affected according as we adopt the forfeit-idea or the usufruct-idea as the key to its development; and it remains to be shown, by some more competent hand, which of these theories (that of Heusler or that of Franken) receives corroboration and illustration in English history.



these results. It may be necessary to add, however, that there is no intention of suggesting the notion that the development of the pledge-idea might *a priori* have been expected to be the same in all systems, or that for any other legal idea the form or the expedients or the progress must be or is likely to be identical among various peoples. On the contrary, the point of view, in the comparative study of legal ideas, is rather, assuming nothing beforehand, to ascertain exactly what forms and expedients were employed for the specific purpose in question, to note the likenesses and the differences, and to learn how far the differences and contrarieties — great or small, radical or superficial — are explainable by the differing conditions of national life.

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SOME PROBLEMS IN OVERDUE PAPER.<sup>1</sup>

PERHAPS in no branch of their jurisprudence have the learned judges of a race that is pre-eminent for its commercial instincts and its facile ingenuity in devising simple and accurate business methods, wandered so far astray from the logical development of fundamental principles as they have in their adjudications on questions of mercantile law, which at this day have intrinsically neither in themselves nor from the custom of merchants any apparent legal difficulty. Lord Mansfield, in his wise desire that the principles of commercial law should subserve and be consistent with mercantile usage, placed the foundations of this branch of the Common Law upon broad and solid bases. But the new questions which have arisen since his time for the most part have not been developed or settled upon any logical deduction from the previously established legal principles. Excrescences upon well recognized legal doctrines and inexplicable confusion have taken the place of an orderly and scientific and logical growth. Learned judges have snatched at catch phrases of legal maxims, and have blindly applied them in the disposal of cases before them. They have made exceptions to general rules without apparent reason, and distinctions without legal differences, and in one instance at least they have engrafted upon what is ostensibly the same negotiable instrument the possibility of its importing different rights according to the occult facts attendant upon its inception.<sup>2</sup> Even so great a lawyer and judge as Lord Ellenborough decided two cases involving the same principles of commercial law in different ways.<sup>3</sup> It would be invidious to animadvert upon the causes and reasons for this most unsatisfactory and amorphous state of the law mercantile in general, and of that branch of it which deals with the question of the rights and equities in overdue negotiable paper in particular. But it is not too

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<sup>1</sup> I wish to gratefully acknowledge my indebtedness to Professor James Barr Ames for the use of his collection of the authorities, and for other material aid, and to Mr. James Parker Hall and Hugh Walker Ogden, Esquire, for the use of their notes taken in the classroom in February and March, 1896.

<sup>2</sup> *Minot v. Russ*, 156 Mass. 458.

<sup>3</sup> *Crossley v. Ham*, 13 East, 498; *Dunn v. O'Keeffe*, 5 M. & S. 282.



much to say that the latter resembles a battered old hoopskirt, "without form and void," which has been raked from the ash-heap of abandoned legal principles.

It would be neither interesting nor instructive to attempt a discussion of many of the cases which relate to this subject, but there are some legal problems which are presented by some of the adjudications that, when analyzed, possess at least the interest of wonder. Indeed, some of these decisions are so curious, and have departed so far from any logical thesis, that on the one hand they appear to be for the most part *sui generis* and incomparable to anything else in our law, and on the other hand the different classes of cases seem to be irreconcilable with one another, either upon the legal theory upon which they were adjudged or upon any other conceivable legal doctrine. If therefore there be any legal principle upon which a majority of the actual decisions in this branch of the law can be reconciled and explained, its discovery and enunciation would be a most valuable contribution to the science of our jurisprudence, and I earnestly hope that the present attempt at a succinct presentation of some of the cases and the problems which they create may give rise to a salutary discussion of the subject. Whatever conclusions I have come to or may state are at most tentative, and I wish to affirmatively deprecate any accusation of dogmatism.

There are three theories of overdue negotiable paper, no one of which has been consistently adopted by the Common Law. It is consequently difficult, if not impossible, to get either a correct perspective from which to view the cases or an absolute standard by which to measure their correctness. It appears to me to be impossible to follow the ordinary method and test the correctness of a case relating to overdue negotiable paper by the application of the logical deduction and modification of the principles which underlie the law of negotiable paper before maturity, because to do so would be to condemn almost every case to the limbo of legal error. It would have been easy, and far more satisfactory, if the decisions had been placed upon what apparently ought to be the true doctrine, namely, that the only change that maturity makes in a negotiable instrument is that it gives notice on its face that the obligor has not fulfilled his contract, and that therefore he either has a valid defence or is bankrupt, and the purchaser of such an overdue instrument takes it with this notice, just as

he would take it before maturity, subject to any defences of which he had notice. Consequently, it is too clear for argument that upon this theory the purchaser after maturity, in good faith and without actual notice of any infirmity, ought not to be liable to outstanding equities in favor of former parties who have owned the instrument, or of outside persons. The title to negotiable paper passes in the same way and by the same means after its maturity as before, and the purchaser for value in good faith of the legal title of anything, whether it be land or personalty, ought not to be subject to any claims or equities against that title of which he had no notice. But the courts have treated many, if not most, of the questions which have arisen concerning overdue commercial paper as analogous to, if not strictly identical with *choses in action*. Yet they have allowed the transferee of such overdue paper to sue in his own name. It seems to me that this fact is a fundamental objection to the theory that an overdue negotiable instrument is a *chose in action*. It is not a sufficient answer to say that, although it is a *chose in action*, the holder can sue in his own name by the custom of merchants; for, in the first place, if a negotiable instrument before maturity be a negotiable *chose in action*, which in some of its aspects it certainly is, when it is shorn of its negotiability, as it must now be taken to be settled that it is the moment that it becomes due, it *ex vi termini* has lost its attribute of being so transferred, for negotiability means that the legal title to a right of action is capable of such transfer that the transferee can sue in his own name. The transference of the legal title is the test, the right to sue in the assignee's name being merely incident to such transfer. Furthermore, there is the objection to the doctrine, that upon it that class of cases cannot be explained which hold that, where the holder before maturity has made some contract in regard to the security, the equity cannot be followed into the hands of a purchaser after maturity; for it is conceived that in every case of a *chose in action*, whether by statute or otherwise the transferee is allowed to sue in his own name, he can acquire only the rights of the transferer, and must work out his rights through the original obligee. It seems therefore that a negotiable instrument must be at least more than a negotiable *chose in action*, and it certainly has many of the attributes of a chattel. Unlike a *chose in action*, its possession is essential to the enforcement, and its delivery to a transfer, of the obligation which it imports,



and it has a substantial value. As Professor Ames has felicitously said, "The holder's right *in personam* is dependent upon his having a right *in rem*."<sup>1</sup> Moreover, trover can be maintained for a negotiable instrument even after it is due; it may be the subject of gift *mortis causa*; it is "goods and chattels," within the Statute of Frauds, and it can be taken on execution.<sup>2</sup> There would seem to be, on principle, no difficulty in the adoption of the doctrine that such an instrument is a chattel importing contractual rights, as any other chattel imports rights of user, and that it is negotiable before maturity, and upon its becoming due loses its negotiability. Yet there is a large class of cases, to be referred to hereafter, which have apparently settled the law on one point, and which can be explained upon such a theory only with the greatest difficulty, and by referring them to the law of agency. The truth seems to be that the law has treated overdue negotiable instruments both as chattels and as *choses in action*, and further, at times, as something else that is distinctly *sui generis* and unnamed. The supreme difficulty, however, in dealing with the subject is that the courts have ignored to a most surprising extent the question of legal title, and yet I conceive that that is the fundamental one in these cases, as it always is wherever there are conflicting equities.

Although there are comparatively few cases on overdue negotiable instruments, I shall not attempt to cite all of them, my purpose being to show some of the propositions that seem to have been settled by them, and to suggest other questions which might arise, but which so far as I am informed, have not been passed upon by any court. In the first place, therefore, it having been held that if a negotiable instrument indorsed in blank or payable to bearer is stolen and negotiated before maturity to a *bona fide* purchaser for value, the latter can enforce the obligation against the obligor, and retain the fruits of his purchase,<sup>3</sup> it would be interesting to see what a court would do if, instead of suing the original obligor, the purchaser sued the last indorser, from whom the bill or note was stolen. It is conceived that in such a case the indorser would have no more of a defence than the maker or drawer, and would be compelled to fulfil his contract. On the other hand, it has been repeatedly held

<sup>1</sup> 2 Ames, Bills and Notes, 799.

<sup>2</sup> Ibid.

<sup>3</sup> Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 3 Burr. 1516; Peacock v. Rhodes, 2 Doug. 633.

that, if the negotiable instrument is stolen after its maturity, the transferee from the thief who has purchased for value and in good faith gets no title to the instrument, and can keep neither it nor its proceeds as against the one from whom it was stolen.<sup>1</sup>

And likewise the same has been held where the theft was perpetrated before the maturity of the instruments, but the thief did not transfer them until after their maturity.<sup>2</sup>

If a *bona fide* purchaser before maturity gets an obligation unimpeachable even by the one from whom it has been stolen,<sup>3</sup> it must be because he gets the title to it. Yet it is difficult to see how a thief either gets or can confer title to his transferee, unless the analogy of the doctrine of *market overt* is adopted. On the other hand, however, even in the case where the security is stolen after its maturity, there can be little doubt, despite an intimation to the contrary which escaped the learned Mr. Justice Lord in delivering the opinion of the court in *Hinckley v. Union Pacific Railroad*,<sup>4</sup> that if a *bona fide* purchaser from the thief presents it to the obligor, who pays it in good faith and without notice, such obligor would be protected from paying again, for he has simply fulfilled his contract; and this seems to prove that the transferee from the thief gets the title. It is therefore difficult, if not impossible, to explain why or how the owner from whom it was stolen can recover from the purchaser, for his claim can be nothing more than an equity, and the purchaser for value without notice is universally protected against the prior equities of third parties, and this would seem to be true in some cases also even of a purchaser of a *chose in action* from the true owner, for the assignee would clearly acquire a legal power of attorney, the title to which ought to be protected. In either aspect, therefore, whether an overdue security be a chattel or a *chose in action*, or partly one and partly the other, it is difficult to support upon principle the

<sup>1</sup> *Down v. Halling*, 4 B. & C. 330; *Greenwell v. Haydon*, 78 Ken. 332; *Davis v. Bradley*, 26 La. Ann. 555; *Weathered v. Smith*, 9 Tex. 622; *Walker v. Wislon*, 79 Tex. 185; *Arents v. Commonwealth*, 18 Gratt. 750.

<sup>2</sup> *Von Hoffman v. United States*, 18 Ct. Cl. 386 (overruled on the point that the instruments were overdue, 113 U. S. 476); *Cornell v. District of Columbia*, 20 Ct. Cl. 229; *Gilbough v. Norfolk & Petersburg Railroad Co.*, 1 Hughes C. C. 410; *Wylie v. Speyer*, 62 How. Prac. 107; *Northampton Bank v. Kidder*, 106 N. Y. 221; *Evertson v. National Bank of Newport*, 66 N. Y. 14; *Texas v. White*, 7 Wall. 700; *Texas v. Hardenberg*, 10 Wall. 68; *Vermylie v. Adams Express Co.*, 21 Wall. 138; *Hinckley v. Merchants' National Bank*, 131 Mass. 147.

<sup>3</sup> *Grant v. Vaughan*, 3 Burr. 1516.

<sup>4</sup> 129 Mass. 52, 60.



second block of the above cited cases, since it is not a question of prior or even of equal equities. And this suggestion finds support at least in the fact that where the bill was indorsed to the plaintiff after its maturity by one who had purchased in good faith and without notice before its maturity, the acceptor could not avail himself of the defence that the bill was drawn for a debt contracted in an illegal transaction;<sup>1</sup> and this seems to be the settled law.<sup>2</sup> It is therefore by no means true that even at law the transferee of overdue paper takes it subject to all the equities. But, starting with that proposition as the controlling and fundamental doctrine, there are a number of curious decisions to the effect that where a negotiable security has been transferred to an agent for some specific purpose, such as for collection or for discount, and the bailee has misused it by negotiating it for his own benefit after its maturity, the bailor can recover from the innocent purchaser for value from the bailee.<sup>3</sup> *Turner v. Hoyle*<sup>4</sup> is obviously to be disposed of upon the same principles as the above, and in line with these decisions it was accordingly held that trover could be maintained against a purchaser for value without notice of an overdue note from a trustee who had fraudulently converted it to his own use; and *In re European Bank*,<sup>5</sup> is a similar case, where the fraudulent transferrer was a constructive trustee. To the same class of cases also must be added *Chase v. Whitmore*,<sup>6</sup> *Bird v. Cockrem*,<sup>7</sup> and *West v. McInnes*,<sup>8</sup> in each of which an agent discounted with authority so to do a note with his principal's funds, and after maturity wrongly converted it to his own use by transferring it to a purchaser for value without notice.

It cannot be doubted that the title to a note or bill of exchange payable to bearer or indorsed in blank and government bonds passes merely by delivery, whether the transfer be before or after maturity; and so in all of these cases, notwithstanding the remarks of Mr. Justice Heath in *Goggerley v. Cuthbert*,<sup>9</sup> that "the delivery of the

<sup>1</sup> *Chalmers v. Lanion*, 1 Camp. 383.

<sup>2</sup> 1 Ames, Bills and Notes, 691, n. 3.

<sup>3</sup> *Lee v. Zagury*, 8 Taunt. 114; *Kerr v. Straat*, 8 Q. B. U. C. 82; *Foley v. Smith*, 6 Wall. 492; *Thomas v. Kinsey*, 8 Ga. 421; *Towner v. McClelland*, 110 Ill. 542; *McCormick v. Williams*, 54 Iowa, 50; *Henderson v. Case*, 31 La. Ann. 215; *Stern Brothers v. Germania Nat. Bank*, 34 La. Ann. 1119; *Emerson v. Crocker*, 5 N. H. 159; *Farrington v. The Park Bank*, 39 Barb. 645; *Huddleston v. Kempner*, 3 Tex. (Civil App.) 252; *Goggerley v. Cuthbert*, 2 B. & P. n. r. 170; *Ford v. Phillips*, 83 Mo. 523; *Proctor v. McCall*, 2 Bail. S. C. 298.

<sup>4</sup> 95 Mo. 337.

<sup>5</sup> L. R. 5 Ch. App. 353.

<sup>6</sup> 68 Cal. 545.

<sup>7</sup> 28 La. Ann. 70.

<sup>8</sup> 23 Q. B. U. C. 357.

<sup>9</sup> 2 B. & P. n. r. 170, 171.

bill was not absolute, but conditional, and was in the nature of an escrow," and of Mr. Justice Chambre, in the same case and on the same page, that "the plaintiff only parted with a possession of the bill," it cannot be doubted that the agent or the trustee gets the title to the instrument, and that he is therefore more than a bailee, for if the attempt be made to deliver it in escrow, it cannot be any more successful than the attempt to deliver a deed in escrow to the grantee. The agent can sue upon the instrument in his own name, and where it is transferred to him for collection it is the intention of the principal that he should do so, if necessary, and where, as in *Goggerley v. Cuthbert*,<sup>1</sup> the agency is to procure the discount of the instrument, it is obvious that the agent has authority likewise to pass the title. Of course, too, a trustee must have the title. Obviously, therefore, in all these cases, if an overdue negotiable instrument is a *chose in action*, the agent or trustee possesses the title thereto, which, it is believed, is a legal power of attorney, and on a sale of that power a purchaser for value without notice ought to be protected. If, on the other hand, it is simply a question of equities, which is the theory upon which all the above cases have been decided, and upon which, it must be admitted, almost every case in the books has treated disputed rights in or to a *chose in action*, there can be no doubt that those cases, where the transfer of the security to the agent or trustee has been after its maturity, were decided not only in accordance with the great weight of authority, but also in consonance with the principle which has just been indicated. For in such cases the purchaser must still work out his right through the original holder of the *chose in action*, who was not the agent, and so he could not get any further rights than those the agent had, it being impossible for the latter to assign more or greater rights than he held. And the same would be true of a trustee. But it is believed that those cases where the agent or trustee held the legal title to the *chose in action*, having obtained the title to the security before its maturity, although rightly decided upon the ordinarily accepted doctrine of the transfer of *choses in action*, for then both the principal or *cestui que trust* and the purchaser had an equity against the fraudulent fiduciary, and that of the former was prior, were decided wrongly upon principle, because then the purchaser would have obtained a legal power of attorney from the fiduciary, and the original holder would have only his equity against the fiduciary.

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<sup>1</sup> 2 B. & P. n. r. 170.



On the other hand, if the chattel attributes of negotiable instruments preponderate and obtain, it can be confidently asserted that the cases under discussion were wrongly decided, because the fiduciary manifestly had the title, and conveyed it to a purchaser for value without notice. It is conceived, however, that in any event some element of the law of agency has entered into the disposal of these cases, the characteristic policy and tendency of which are the protection of the principal.

Opposed to these numerous adjudications are *Bradford v. Williams*,<sup>1</sup> *Parker v. Stallings*,<sup>2</sup> *Connell v. Bliss*,<sup>3</sup> *Eversole v. Maull*,<sup>4</sup> and *Lee v. Turner*,<sup>5</sup> an extended treatment of which does not seem to be necessary. The two decisions by the Supreme Court of North Carolina go upon the distinct ground that the real owner had given the title to his agent and authority to dispose of it as his own. The Maine case went off upon the ground of negotiability, the Chief Justice expressly saying that "the dishonor of the note had no tendency to affect the defendant with notice that the title was not in" the agent; and the Maryland and Missouri cases were determined upon the very questionable ground of estoppel that has been applied and established in New York, to the effect that one who has given the ostensible title to another is estopped from setting up the real facts against a purchaser for value without notice.<sup>6</sup> The doctrine of *McNiel v. Tenth National Bank*,<sup>7</sup> has been so often erroneously applied in the disposal of cases, and its rightful applicability is so dependent upon the particular facts of each case, that it seems to be impracticable to enter upon a discussion of it in this article.

There is another class of cases which obviously involves the same principles of law, and is strictly analogous to those in which the holder who has fraudulently transferred the instrument after its maturity has been an agent, where one wrongfully obtains or without right retains its possession and fraudulently transfers it to an innocent purchaser after its maturity. In *Wood v. McKean*,<sup>8</sup> the payee of a note indorsed it in blank and transferred it as collateral security. He afterwards paid the debt without procuring the return of the note, and after its maturity the holder transferred

<sup>1</sup> 91 N. C. 7.

<sup>3</sup> 52 Me. 476.

<sup>5</sup> 89 Mo. 489.

<sup>2</sup> Phillips (N. C.), 590.

<sup>4</sup> 50 Md. 95.

<sup>6</sup> *McNiel v. Tenth National Bank*, 46 N. Y. 325; *Moore v. Metropolitan National Bank*, 55 N. Y. 41.

<sup>7</sup> 46 N. Y. 325.

<sup>8</sup> 64 Iowa, 16.

it to the defendant for value. It was held that the payee could recover, and to the same effect is *Osborn v. McClelland*<sup>1</sup> and the cases of *Church v. Clapp*,<sup>2</sup> *McKim v. King*,<sup>3</sup> and *Midland Railroad Company v. Hitchcock*,<sup>4</sup> where the possession of the instrument was procured from the owner for some specific purpose, and then fraudulently misappropriated after its maturity, are of course similar, and were decided in accord with *Wood v. McKean*.<sup>5</sup>

It is believed that these cases are not to be supported, for the same reasons and upon the same principles that have been indicated already in regard to the prior cases. Indeed, there are three adjudications in which a diametrically opposite result was reached.<sup>6</sup> In *Moore v. Moore* the indorsement of the note in question was procured by fraud, and the title came to a *bona fide* purchaser after maturity, and Mr. Justice Mitchell, delivering the opinion of the court, said: "It is familiar law that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good faith purchaser. We are unable to discover any good reason for a distinction in that regard between chattels and such instruments as may be assigned by endorsement, so as to give the assignee a complete legal title."<sup>7</sup>

The question of legal title is strongly brought out in *Etheridge v. Gallagher*,<sup>8</sup> where Etheridge had taken two notes in payment for land, and agreed to convey the land upon the payment of the notes. He afterwards transferred one note to Eiland in part payment for another piece of land bought by him, the title to which failed, and, Eiland having transferred the note to Gallagher after it was due, suit was brought upon it, and Etheridge set up the above fact of failure of consideration as a defence, and it was rightly held that, Gallagher having acquired the legal title, it was not subject to be defeated by outstanding equities; and of the same import are *Hibernian Bank v. Everman*,<sup>9</sup> *Hill v. Shields*,<sup>10</sup> *Crosby v. Tanner*,<sup>11</sup> and *Blake v. Koons*.<sup>12</sup> It appears to me that hardly any one can doubt the validity of these cases. Yet it is submitted that they cannot be explained upon the theory that an overdue security

<sup>1</sup> 43 Oh. St. 284.

<sup>2</sup> 58 Md. 502.

<sup>3</sup> 64 Iowa, 16.

<sup>4</sup> 47 Mich. 257.

<sup>5</sup> 37 N. J. Eq. 549.

<sup>6</sup> *Neuhoff v. O'Reilly*, 93 Mo. 164; *Cochran v. Stewart*, 21 Minn. 435; *Moore v. Moore*, 112 Ind. 149.

<sup>7</sup> 112 Ind. 152.

<sup>8</sup> 52 Miss. 500.

<sup>9</sup> 40 Iowa, 136.

<sup>10</sup> 55 Miss. 458.

<sup>11</sup> 81 N. C. 250.

<sup>12</sup> 71 Iowa, 356.



is a *chose in action*, for that principle embodies the fundamental doctrine that one must work out his rights to a *chose in action* through the original and only legal holder, and consequently the defendant can take advantage of any defence which he may have, whether that defendant be an indorser or the obligor. It is believed that in such cases as these, if an overdue note is a *chose in action*, the one who has an equity ought not to be allowed to recover back the instrument or its proceeds, but that clearly the *bona fide* purchaser should be entitled to keep whatever he has got. He is at least the purchaser of a legal power of attorney to reduce the *chose in action* to possession, and although therefore he may maintain a suit against the obligor, yet, being obliged to work out his rights through the original owner of the *chose in action*, he cannot maintain a suit against one who has an equity against that original owner. As, for instance, in *Etheridge v. Gallagher*,<sup>1</sup> Gallagher had a right to maintain an action against the maker of the note, but, being obliged to work out his rights against Etheridge, the indorser, through Eiland, he could not recover from him. Consequently, the case must be explained upon one of the other two theories of overdue paper, upon either of which it is obvious that it can be supported.

The case of *Theisen v. Dayton*,<sup>2</sup> which has been sometimes cited as *contra* to the above, has in reality nothing whatever in common with them, being simply a case where the first mortgagee foreclosed and bought in, securing also a conveyance of the equity of redemption, from the vendee of the mortgagor. The vendee had meanwhile bought in the second mortgage and notes. It is evident that, the latter having assumed their payment, the mortgage and notes were paid and extinguished by his buying them in, and therefore his transferee after maturity obtained nothing, and it was so held.<sup>3</sup>

There is one more case that is analogous, and that appears to require some consideration. In *Kernohan v. Durham*,<sup>4</sup> Durham paid two mortgage notes, which he had given to McGill by executing and delivering to him a new note and mortgage. McGill after they were due, having neglected to deliver them up or cancel them, pledged the old notes to one Kinney for a loan. Thus far the legal situation, it is clear, was that McGill was the constructive trustee

<sup>1</sup> 55 Miss. 458.

<sup>2</sup> 82 Iowa, 74.

<sup>3</sup> *Cuvillier v. Fraser*, 5 Q. B. U. C. 152.

<sup>4</sup> 48 Oh. St. 1.

of the old notes for Durham, and that, as the law is, Durham could recover them from any one into whose hands they were transferred;<sup>1</sup> and moreover that Durham had paid them and could not be sued upon them,<sup>2</sup> and it was so held. But this was not the end of McGill's wrongdoing, for he pledged a forged copy of the new note before its maturity to Kernohan, and after its maturity he pledged the genuine copy to Coddington, upon which Durham had made some payments. McGill, then, was at most a constructive trustee of the new note and the payments made upon it for Kernohan; and he transferred it to an innocent purchaser for value after maturity. It was held that Kernohan was able to follow his equity to the note into such purchaser's hand. Of course this case cannot be reconciled with those that have been cited immediately prior, and can only be supported upon the theory that an overdue note is a *chose in action*, and the adoption as correct of the principle of *choses in action* as established by the weight of authority. But it is also a curious case in another aspect, for if an overdue note is a *chose in action*, Kernohan apparently, having contracted for a negotiable security, neither asked for nor obtained sufficient relief.

It has occurred to me that there could not well be a better conclusion to this article, both as an epitome and commentary upon it and upon the law which it has sought to set forth, than the words of the learned Mr. Chief Justice Gilfillan, delivering the opinion of the court in *Cochran v. Stewart*<sup>3</sup>: "It is not necessary to decide here whether, as a general rule, the assignee of a *chose in action* takes it subject to all equities, as well of third persons as of the debtor or obligor. But we will go so far as to hold that if an owner of a *chose in action*, intending to pass the absolute title, executes an absolute assignment, and delivers with it the evidences of the *chose in action*, his assignee may transfer to a purchaser for a valuable consideration, and without notice, just the title which he appears to have by the assignment and possession of the evidences of the debt. *McNeil v. Tenth National Bank*.<sup>4</sup> In this regard, we see no difference between transfers of *choses in action*, and of other personal property."

Francis R. Jones.

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<sup>1</sup> *Turner v. Hoyle*, 95 Mo. 337; *In re European Bank*, L. R. 5 Ch. App. 358.

<sup>2</sup> *Cuvillier v. Fraser*, 5 Q. B. U. C. 152.

<sup>3</sup> 21 Minn. 435, 440.

<sup>4</sup> 46 N. Y. 325.



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THE ANTI-TRUST DECISION. — Since the Supreme Court of the United States declared the Income Tax unconstitutional, it has given no decision which has aroused so much general interest as that in the case of *United States v. The Trans-Missouri Freight Association*, 17 Sup. C. Rep. 540. Its immediate effect has been to unsettle the whole of the railway business of the United States; and many of those who ought to know prophesy nothing less than a financial disaster to the country, unless the court changes its position, or Congress passes a new statute to fit the case. Even if one is inclined to believe the result to be unfortunate, the question remains whether the Court or Congress is to blame. The next number of the HARVARD LAW REVIEW will contain a leading article discussing this subject.

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THE REGISTRATION OF LAWYERS. — A bill providing for the registration of lawyers has recently been introduced into the New York Legislature. Embodying in its essential features certain suggestions made at the last annual meeting of the New York Bar Association, the proposed law requires every attorney regularly admitted to practice in courts of record to enroll his name in the office of the clerk of the county in which he resides; and directs that, from the authentic lists thus obtained by the various county clerks, the clerk of the Court of Appeals shall make up the "Official Register of Attorneys and Counsellors at Law in the State of New York."

While the bill, as introduced, may perhaps be open to criticism as to several matters of detail, the general plan itself certainly indicates a step in the direction of conservative legal reform. Under conditions now existing in many States, it is often exceedingly difficult to ascertain definitely whether a certain individual, holding himself out to the world as an attorney at law, has actually been admitted to the bar. As the natural result of this state of affairs, many unscrupulous and ignorant parties masquerade as "lawyers," to the injury of the unsuspecting classes in the community, and to the disgrace of the profession itself. Were it only easier to detect

these pretenders, it is believed that every honest lawyer would make it his business to investigate suspicious cases coming within his notice, and a carefully formulated system of registration seems to furnish him with the necessary assistance in accomplishing this purpose.

The hearty support accorded this plan by the profession in New York is but further evidence of a progressive spirit which might well be emulated in other jurisdictions. Medical practitioners, looking to their own welfare and to the protection of the public, have already provided a registry system; but the legal profession, similarly, would not only add to its own dignity, but increase its usefulness to society, by securing the adoption of some such plan as that outlined in the New York measure, and by rigidly enforcing its requirements in letter and spirit.

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CHARGING THE JURY. — The numerous comments made in newspapers and legal periodicals upon the charge to the jury in the trial of the Bram murder case, and upon the opinion of the court on refusing a new trial, bring into notice the marked difference in practice between the Federal courts and most State courts with respect to the judge's commenting upon the evidence in the charge. There can be little doubt that the charge in this case was entirely unexceptionable, according to the rule laid down in the Federal courts. Following the established English rule, the Supreme Court of the United States has often held that it is proper for the judge, and sometimes even incumbent upon him, to express in his charge to the jury his own opinion of the weight of the evidence that has been offered, and of the facts which he considers it to prove, provided always that he clearly instructs the jury that the determination of all questions of fact is left to their own independent judgment. In almost all State jurisdictions on the other hand, an increasing jealousy of the possible influence of the judge upon the jury's verdict has by various means made any expression of opinion by the judge upon questions of fact a ground for exceptions. In several States, such as Arkansas, California, Nevada, South Carolina, Tennessee, and Washington, any comment upon the evidence by judges in charging a jury, is prohibited by the State Constitution. In very many other States, of which Massachusetts is one, the same result is reached by a statute. To allow exceptions upon such grounds, in the absence of any statutory provision, would seem to be an unwarrantable departure from the old common law view, which was that it was the duty of the judge to assist the jury in the determination of matters of fact by his advice, founded on his extensive experience and his superior training in habits of logical thought. How positive and urgent such advice may be, when the jury are at the same time instructed that the final decision is left entirely to their judgment is a question which must always depend to some extent on the temper of the courts, and of the community in which they administer justice; and accordingly even the Federal courts are more inclined to restrict the action of judges in this respect than are the English courts. The effect of the statutes referred to is to prevent the court from in any way aiding the jury in the determination of matters of fact, and to render it extremely difficult for a judge to sum up the evidence without laying his charge open to exceptions. It is certainly the opinion of many lawyers that juries are more apt to go wrong in their verdicts under this rule of practice than under the rule of the Federal and of the English



courts. It would perhaps be well for those who are anxious for the preservation of the jury system, at a time when much dissatisfaction is felt with its practical operation, to consider whether the danger of judges influencing juries to give unjust verdicts is so serious as to make it advisable to diminish the practical efficiency of jury trials by preventing the judge from giving the jury the benefit of his generally superior powers of reasoning and wide experience in the facts of cases.

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**LIBEL AND CRITICISM.** — A scientific man has written a book in which he attempts to disprove the existence of the force of gravity. A scientific newspaper, in reviewing the book, attempted to show by way of criticism that the author does not know enough to be able to appreciate the force of the argument by which the law of gravitation is proved. The author says that this is a false and malicious libel, and that it has damaged him to the extent of thousands of dollars.

Criticism in good faith of an author's work is allowed almost without restriction ; but the law guards the private individual as distinguished from the man in his public capacity. It does not permit the critic to go behind the book to attack the author as a private person. On these principles Mr. Ruskin, in speaking of Mr. Whistler's paintings, was able with impunity to charge the artist with the "cockney impudence" of asking two hundred guineas for "flinging a pot of paint in the public's face." But when he accused him of "wilful imposture," he overstepped the mark, and had to pay a farthing in damages. In the present case, the question is whether the imputation of ignorance has a legitimate bearing as criticism upon the book. If the imputation of ignorance is made as an inference from the book itself, it seems to have a clear connection with the credit to which the book is entitled. It is true that in an English case, *Dunne v. Anderson*, 3 Bing. 88, it was held to be libel for one, in criticising a petition to Parliament by a physician, to reflect upon the physician's knowledge of chemistry. But that case is to be distinguished from the present one, in that in presenting the petition the physician is not so distinctly before the public as the author in publishing a book. As Lord Cockburn says in *Strauss v. Francis*, 4 F. & F. 1114, "a man who publishes a book challenges criticism." The critic is strictly accountable for any damaging misstatement of fact ; but here there is no such misstatement. If there were nothing in the book which might lead a reasonable man in the critic's position to take the same view, it might be held that this was not fair criticism. But the force of gravity is well enough established for the courts to take judicial cognizance of it ; and they are hardly likely to hold that this statement, if made merely as a deduction from the author's treatment of his subject, was so unfounded as to be a libel, rather than a fair though strong criticism.

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**CONFLICT OF LAWS — PENAL STATUTES.** — The extent to which courts will recognize rights acquired under foreign statutes is still more or less indeterminate. A few general propositions, to be sure, such as that penal statutes will not be enforced, are well established. But their application to concrete cases has proved by no means an easy task. Thus the familiar statutory action for the negligent causing of death has troubled the courts not a little. In the late case of *Dale v. R. R. Co.*, 47 Pac. Rep.

521, the Supreme Court of Kansas refused to enforce a liability incurred in New Mexico, under a statute providing that in case any person should be killed through the negligence of a railroad official in the management of a train, the corporation should forfeit and pay five thousand dollars, which could be recovered by the husband or wife or minor children of the deceased. The court went largely on the ground that the statute was penal in its nature. Inasmuch as the sum recoverable was absolutely fixed, and in no way proportional to the injury received, it does look, perhaps, as if the legislature intended to inflict a penalty on the corporation rather than recompense the family of the deceased. The decision therefore seems right. In earlier days it was generally held that, even where the sum recoverable was not fixed, but was dependent upon the extent of the injury, the statute was penal in character; but in more recent times the trend of decisions has been, rightly enough it would seem, in the direction of holding statutes of that sort merely compensatory. Where such is the nature of the statute, rights acquired under it should certainly be enforced in any court having jurisdiction of the parties and the subject matter, exactly as though acquired through a common law tort. *Dennick v. R. R. Co.*, 103 U. S. 11.

In *Huntington v. Attrill*, [1893] A. C. 150, 155, Lord Watson declared that it was for the court called upon to give recognition to a right created by a foreign statute to determine the substance of the right, and whether or not its enforcement would involve the execution of a penal law. The Massachusetts court has recently handed down a decision at variance with this opinion. In *Coffing v. Dodge*, 45 N. E. Rep. 928, it was decided that the liability imposed on the stockholders of a corporation by a statute of another State would not be enforced in Massachusetts, unless the liability was held contractual by the courts of that State. This decision has been sharply criticised, but when interpreted properly seems correct. Of course the Massachusetts court must frame its own definition of penal statutes, and not rest content with the appellation bestowed on the statute by the foreign court. But the construction of a statute of another State is admittedly to be settled by the courts of that State; and, taken in a broad sense, this includes the determination of the substantial nature of the obligation intended to be created. The question for the Massachusetts court in *Coffing v. Dodge* was not whether the foreign court called the statute penal or contractual, but whether it regarded the statute as giving rise to an obligation of such a nature that it fell within the Massachusetts definition of penal laws.

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THE AVAL THEORY OF ANOMALOUS INDORSEMENT. — Few problems in the law of commercial paper appear to have occasioned the courts greater perplexity than that of determining the liability of one who writes his name on the back of a bill or note to give it credit with the payee. A recent Ohio case, *Ewan v. Brooks-Waterfield Co.*, 45 N. E. Rep. 1094, deciding that this anomalous indorser is presumptively liable as a surety of the maker, represents but one of several conflicting views that obtain in the United States. See 1 Ames's Cases on Bills and Notes, 219-272; 1 Daniel on Negotiable Instruments, §§ 707-716.

While there is much to be said in favor of the view, adopted in New York and a few other States, which allows the payee to charge the anomalous signer as a regular indorser, it is submitted, nevertheless, that such a signer should more properly be regarded, not as a legal holder, but as



merely a surety of that party to the instrument who has been benefited by the anomalous indorsement, and as assuming, in the capacity of such surety, exactly the same legal responsibility as that of the principal. Such an obligation is known to the French law as an *aval*. Apparently there is no English or American decision in which this French conception has been fully recognized as a *ratio decidendi*, but in *Steele v. McKinlay*, 5 Appeal Cases, 754, Mr. Justice Blackburn discusses the doctrine and gives it the authority of his approval. After referring to the principles of regular endorsement, he says: "But I quite agree that, by the custom of merchants as modified by English law, there may also be an indorsement by a person, not a holder of the bill, who puts his name on the bill to facilitate the transfer to a holder. By the old foreign law, not in this respect entirely adopted by the English law, this might be done by what was called an *aval*; . . . and if such an *aval* was given by any one, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the *aval* was given. It appears from Pothier . . . that the *aval* might be made by one who gave his name, either by way of incurring responsibility for the drawer, placing the signature under the name of the drawer, or for the indorser, placing it under the indorsement, or for the acceptor, placing it under that of the acceptance." While, however, this last statement may represent the normal case, the fact that the name of *le donneur d'aval* appears on the back of the instrument, and not directly below that, for instance, of the maker, should make no difference, and in Canada, where the courts have accepted the *aval* theory, this is the law. See *Latour v. Gauthier*, 2 Lower Canada Law Jour. 109 (Quebec); *Merritt v. Lynch*, 9 Lower Canada Rep. 353 (Montreal).

The *aval* idea seems to have been generally adopted on the Continent; and, while the same result has been partially reached by the English Bills of Exchange Act and by statutes in a few States, as well as by some court decisions, it is believed that effect would be more nearly given to the real intention of the parties, and that more perfect justice would be thereby secured, were this doctrine fully incorporated into our law of negotiable paper.

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**LOCALITY OF CRIME.** — The Court of Appeals of Kentucky, in the recent case of *Jackson v. Commonwealth*, 38 S. W. Rep. 1091, has had to deal with the question of the criminal intent and the locality of crime in a difficult form. In Ohio, the defendants administered cocaine to a young woman, intending serious bodily harm. They brought the apparently lifeless body into Kentucky, and, in order to conceal the crime, cut off the head, believing that she was already dead. But the evidence shows that, until the decapitation, she was alive; and the question is raised whether the crime of murder was committed within the jurisdiction of Kentucky.

The prisoners were convicted; and in sustaining the conviction the court is right, although the reasoning is not entirely satisfactory. The fact that the poison was administered in Ohio offers little difficulty. The girl did not die of the poison; she died from the act of violence which took place in Kentucky. Apart from this, two difficulties are to be met before we reach the same conclusion as the court. The act causing death in Kentucky is present; but to constitute the crime of murder, there must be also the general criminal intent and the malice aforethought. If we can find the crime of homicide, we have the requisite

malice, in its technical significance, from the fact that a dangerous weapon was used. But it is urged that there was no general criminal intent, for the killing was done under a mistake of fact; and, further, that it is impossible to consider what took place in Ohio with reference to the act done in Kentucky. To this there are two answers. In the first place, the act of decapitation itself was criminal, the wanton desecration of a dead body being looked upon as *contra bonos mores*; this alone is sufficient to supply the intent. But even were this not true, the general criminal intent may be supplied constructively from the criminal intent to poison. This is the ground the court takes. As evidence of this intent, acts in another State may be considered. Intent does not depend upon jurisdiction; it is a mental quantity, evidence of which may be received from any part of the globe. And as for the existence of the intent at the time of the killing, it would be a strange anomaly if it were law that the wicked state of a man's mind ceases as soon as he believes in the death of his victim, so that he is not responsible for the actual harm resulting from continued indignities. His particular acts may not accomplish the end he contemplates; but by construction the criminal intent is continuous, until the last step is taken in finishing the crime and in concealing its traces. Therefore, in this way too the general criminal intent existed at the time of the killing; and that intent, together with the "malice" implied from the use of a dangerous weapon, makes the act which was done murder.

This result is sanctioned by justice as well as by logic; for otherwise an atrocious murder, owing to an error in its commission, would be nowhere punishable,—not in Ohio, because the poisoning which took place there did not result in death,—not in Kentucky, because the criminality of the act would be held to have ceased before the death.

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THE RIGHT TO FREEDOM OF CONTRACT.—The plaintiff in a recent case in an Ohio Circuit Court, (*Shaver v. Pennsylvania Co.*, 71 Fed. Rep. 931,) became a member of a relief association managed by the defendant railway, under an agreement that the acceptance of benefits from it for any disability should bar a suit for damages against the defendant. An Ohio statute made void such a term in the contract of a railway employee. The plaintiff having accepted aid from the association before suing the railway, the court held the statute unconstitutional, and the contract a valid defence.

The Ohio Constitution guarantees the rights of life, liberty, and property, and provides that laws of a general nature shall be uniform in their operation. The court thought the statute obnoxious to both of these provisions, inasmuch as it deprived the plaintiff of liberty to make contracts for his labor, and, being confined to railway employees, was not uniform in its operation.

There are a considerable number of decisions in this country denying the constitutionality of similar legislation. See *Millett v. People*, 117 Ill. 294 (1886); *Fraser v. People*, 141 Ill. 171 (1892); *Ramsey v. People*, 142 Ill. 380 (1892); *Braceville Coal Co. v. People*, 147 Ill. 66 (1863); *Comm. v. Perry*, 155 Mass. 117 (1891); *Godcharles v. Wizeman*, 113 Pa. St. 431 (1886); *State v. Loomis*, 115 Mo. 307 (1893); *State v. Goodwill*, 33 W. Va. 179 (1889). In all of these cases it is assumed that the constitutional guaranty of "liberty" includes "freedom of contract."



It is difficult to defend this assumption, historically or practically. The terms "life," "liberty," and "property," as used in the bills of rights of American constitutions, have all been derived from Magna Charta, and have been used in various English and American statutes, state papers, and political writings, in a similar sense, down to the framing of our American constitutions. The meaning of "liberty" as thus used was personal liberty, — freedom from bodily restraint. See 1 Black. Com. 127-129; 2 Kent Com. 26 ff.; and especially an article by C. E. Shattuck, 4 HARVARD LAW REVIEW, 365. These terms, in a clause whose significance had been well understood by English speaking publicists and lawyers for several centuries, were imported bodily into most of our American constitutions without indication of an intention to enlarge their scope. Historically, therefore, one can hardly justify a judicial extension of the meaning of "liberty" so radical as to embrace freedom of contract.

But, putting aside all lexicographer's arguments, is such an extension of meaning desirable or in accord with unquestioned legislative precedents? In most of the States there are laws avoiding contracts to pay more than a maximum rate of interest for the use of money; in many there are laws invalidating certain conditions in insurance policies deemed technical or oppressive; and in some there are acts forbidding parties by private contract to shorten the statutory period for bringing actions between them. The constitutionality of such legislation has never been doubted, nor is it difficult to discover a sound principle of public policy on which, within the discretion of the legislature, such laws may rest. Whenever two classes of persons may reasonably be supposed to stand in such relation to each other that the necessity or weakness of one deprives it of real liberty of action in regard to contracts between the two, it is a proper exercise of legislative power to interfere in behalf of the class in danger of being overreached. Opinions may differ about the need of such protection in a given case, but if the Legislature can reasonably decide that it exists, it is not for the judiciary to revise this determination. Surely it is not unreasonable to suppose that men practically compelled to seek their accustomed employment from a few large railway corporations may be at such a disadvantage in bargaining for the sale of their labor that it will be wise to forbid them altogether from making certain contracts. If interdictions against particular agreements concerning loans, insurance, and liability to suit are constitutional, it is not easy to distinguish from them the prohibition of the Ohio statute.

The objection that this is class legislation seems even less forcible. "The lawmaker necessarily deals with conditions as he finds them. If he observes, and wishes to abate, some fraudulent practice or abuse of power prevailing only in some one line of business, the fact that, in legislating to correct it, he does not also include in his remedy all other phases of human affairs, can furnish no reason for stigmatizing his remedy as no law at all." Barclay, J. (dissenting), in *State v. Loomis*, 115 Mo. at p. 322. In every State, mechanics' liens, and particular regulations relating only to carriers, bankers, auctioneers, pawnbrokers, insurance companies or warehousemen, bear witness to the necessity and wisdom of laws of special application to limited classes of persons. The principle of this legislation is well stated by Justice Field in *Barbier v. Connolly*, 113 U. S. at pp. 31, 32 (1884): "Regulations for these purposes,

. . . though in many respects necessarily special in their character, . . . do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions."

Statutes of a character similar to the one in *Shaver v. Pennsylvania Co.* have been sustained in *Hancock v. Taden*, 121 Ind. 366 (1890); *State v. Manufacturing Co.*, 18 R. I, 16 (1892); and *State v. Coal Co.*, 36 W. Va. 802 (1892); and this is believed to be the sounder and more satisfactory doctrine.

**LIMITATION OF THE RIGHT OF SELF-DEFENCE.** — In the case of *Dabney v. State*, 21 So. Rep. 211, the Supreme Court of Alabama has placed a new restriction upon the right of self-defence. The trial judge instructed the jury, in a trial for murder, that if the defendant went to another's house, intending illicit intercourse with that other's wife, and armed himself, though merely for defence in case of attack, he was deprived of the right to kill in self-defence. The Supreme Court supports this position; in fact, the language of the court implies that in any case a man taken in adultery with another's wife cannot justify himself in killing the husband even in self-defence. There is no doubt that, if the defendant committed the wrongful act with the express purpose of creating an occasion for killing, he forfeited the right. In the absence of this express purpose the question is: Did the act amount in law to a provocation, and was the attack in fact provoked thereby? The court rightly answers, Yes. That the law recognizes adultery as provocation for an assault by the husband is shown by the fact that, if death results, the husband is held guilty not of murder but of manslaughter. It is a firmly established principle that he who provokes an attack is not justified in taking life to protect his own. Although in this case the defendant's motive was not to cause the affray, he voluntarily entered upon an act which the law holds to be a provocation, and which did in fact provoke the conflict that took place. Under these circumstances, the court was right in holding that he could not avail himself of the right of self-defence.

The court then proceeds to support the charge on other grounds: one who enters on a wrongful act, and contemplating interference on the part of another, arms himself with a deadly weapon, in order to take the other's life if necessary to save his own, is guilty of murder if he kills. This cannot be supported. The fact that the defendant armed himself merely in view of defending himself cannot militate against him, except as bearing upon his knowledge of the possibility of his being attacked. Does then the fact that a wrongdoer knows that his act may lead another wrongfully to attack him necessarily deprive him of the right of self-defence? It would seem that this can hardly be so. In applying the rule, confusion arises in many cases from a loose use of the word "provoke." If the defendant knew that trouble might arise, and yet persisted in his act, he might be said to have "provoked," in the sense of "given rise to," the affray. But did he in the legal sense provoke an attack? Was his act legally to be regarded as provocation of the murderous assault? Although not supported by the majority of the cases, the court of Kentucky is right in saying that a defendant killing in self-defence is not guilty unless he made it necessary or excusable for the deceased to put him in danger. *Thompson v. Commonwealth*, 26 S. W. Rep. 1100. The conviction here was rightly affirmed, not because the defendant armed himself against a



probable attack in the course of his wrongdoing, but because his wrong was a provocation of the attack upon him.

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GREAT ENGLISH JUDGES. — LORD CHANCELLORS. — "The golden period of equity" is the phrase often used in describing the years from 1737 to 1756, when Philip Yorke, Lord Hardwicke, was the presiding genius in the Court of Chancery. He disposed of the many causes which came before him with a rapidity and accuracy which gave wide satisfaction, and in so doing laid down general principles which "perfected English equity into a symmetrical system." Lord Hardwicke's manner in court approached the ideal. A patient, eager listener, willing to be instructed by counsel, and giving his undivided attention to the argument, he made up his mind only after hearing both sides, and expressed his opinions in carefully prepared written judgments. A pure and fearless judge, he had a sincere passion to advance the science of law. As a man, Lord Hardwicke is scarcely so much to be admired. Determined to get on in the world, from early youth he was relentlessly successful. No failures and no follies mark his steady advance along the path to the Woolsack through the positions of Solicitor General, Attorney General, and Chief Justice of the King's Bench. He seems to have resolutely shut out from his life all which could not aid his ambition. Avaricious, arrogant in society, he forgot his own humble birth, he forgot old friends who had helped him, and sought and cared only for the rich and the great. In politics Hardwicke was a Whig, and was almost as able as a statesman as he was splendid as a judge. During Newcastle's ministry he was virtually the head of the nation. Lord Hardwicke was strikingly handsome, and to his personal attractiveness much of his early success was due.

A small, well-featured man, sitting on the bench with an air of dignified repose which did not betray that he was paying little attention to the rambling and unchecked arguments of the counsel before him; patiently amusing himself with his private correspondence till the causes of the day were over, then taking all the papers involved to be considered at his leisure; finally, having been at greatest pains and labor to reach a decision in each case, delivering, often years after the cause was first heard, judgments which were generally spoken without the aid of a single note; — such was perhaps the most famous of Chancellors, John Scott, Lord Eldon. With the exception of the year 1806, he presided in Chancery from 1801 to 1827. His prevailing characteristics as a judge were a sincere desire to do justice between man and man and an almost exaggerated fear of erring either as to law or facts. Although, combined with his naturally dilatory habits, these attributes made the delays in Chancery matter of common reproach and ridicule, they resulted in an almost unbroken line of fair and correct decisions. Lord Eldon's private life was not lacking in romantic incident. He came from a poor and humble family, narrowly escaped first the career of a coal-fitter, and later that of a country parson; he eloped with his wife in genuine story-book fashion, taking her from her second story window by means of a ladder one dark night; and he finally became a master of English law by hard and unremitting study. Eldon was, however, versed only in law. He knew nothing of general literature, had no imagination or artistic sense, and when not attending to state or judicial business preferred the society of his inferiors to that of men and women of wit and understanding. As a

statesman he was distinguished for his bitter hatred of the Catholics and his violent opposition to every species of reform.

For a brief period in 1868, and again from 1874 to 1880, the head of the English judicial system was Hugh McCalmont Cairns, Lord Cairns. He is considered by many to have been the ablest lawyer of his time. He was not, however, deeply versed in black-letter learning, like Willes and Blackburn, but was distinguished rather for his exhaustive discussion of a matter on principle. His great attribute was lucidity. Probably no other judge of any time has possessed a power of clear statement equal to that of Lord Cairns. One of his biographers has described his appearance in court to be "cold, impersonal, like an intellectual machine minting law." Though born in Ireland, Lord Cairns was of a Scotch family, and was through life an ardent evangelical churchman. His great piety is said to have been something of a jest among members of the bar, and to have been traded upon by the unscrupulous, like the vice of another man. He was almost as great a statesman as a judge, and he was influential in passing the Judicature Acts. He took his recreation in the hunting field on Saturdays and in shooting on the moors of Scotland in the vacation. His great career is the more remarkable in view of the fact that he had to struggle continually with physical weakness and illness, and to take constant precautions in order to be fit for any work.

## RECENT CASES.

AGENCY — WARRANTY OF AUTHORITY — PUBLIC OFFICERS. — Defendant, a public officer, acting in excess of his authority, employed plaintiff on behalf of the Crown for three years. Plaintiff was discharged within that time, and brought action against defendant. *Held*, that the doctrine that an agent who makes a contract for his principal impliedly warrants his authority does not apply to a public servant acting on behalf of the Crown. *Dunn v. Macdonald*, [1897] 1 Q. B. 401.

This limitation of the doctrine of *Collen v. Wright*, 8 E. & B. 647, is based on the rule of policy laid down in *Macbeath v. Haldimand*, 1 T. R. 172, and *Gidley v. Lord Palmerston*, 3 B. & B. 275, to the effect that an action will not lie against a public servant for any liability contracted in the course of his public employment. The principal case pushes that rule as far perhaps as would be advisable. It may, however, be justified by the danger of deterring responsible persons from entering the public service, if an honest mistake in interpreting their powers is likely to result in their being personally liable on contracts made for the government.

BILLS AND NOTES — CHECK AN EQUITABLE ASSIGNMENT. — The president of the K. Bank in Philadelphia requested a loan of \$25,000 from the plaintiff bank of the same city, representing that the K. Bank owed a large balance at the clearing-house, but had a credit of \$27,000 with its New York correspondent, and offering to give a check thereon for the amount of the loan. Relying upon these representations, the plaintiff bank advanced the money, and received the check. The K. Bank failed the next day. *Held*, an equitable assignment of the fund on deposit with the New York correspondent was created, so that the plaintiff bank could claim the amount of the check as against the receiver of the drawer. Gray, Brewer, and Peckham, JJ., dissenting. *Fourth Street Nat. Bank v. Yardley*, 17 Sup. Ct. Rep. 439.

The court, while distinctly recognizing that a check does not constitute an equitable assignment of the drawer's funds in the hands of the drawee, (see 10 HARVARD LAW REVIEW, 523,) makes an exception in the principal case on the ground that the transaction was not within the ordinary course of business, and the circumstances implied an actual intent to create an assignment. It may be doubted if such an implication could be properly drawn from the facts. Even if the facts warranted the finding of an implied assignment, the action would lie; not on the check, for a check, being a general order to pay money, cannot be construed as an assignment of a particular fund:



but upon a collateral agreement for an equitable assignment, of which the check is evidence. This distinction does not seem to be clearly made by the court.

**BILLS AND NOTES — PROVISION FOR ATTORNEY'S FEES.** — A note for a certain sum maturing at a certain date contained a provision for the payment of ten per cent attorney's fees in case of suit for collection. *Held*, that this provision rendered the amount uncertain, and so destroyed negotiability. *Sylvester Bleckley Co. v. Alcumie*, 26 S. E. Rep. 609 (S. C.).

There has been much conflict of opinion on this point, but the weight of authority in the later cases is undoubtedly in favor of the negotiability of instruments with such provisions. The provision does not render uncertain the amount due at maturity; it is not a part of the main promise, and it only takes effect, if at all, after maturity. Nor is it so foreign to the main promise as to be a burden on the note. It is instead an aid to circulation. *Stapleton v. Louisville Banking Co.*, 23 S. E. Rep. 81 (Ga.); 14 Fed. Rep. 671, note.

**BILLS AND NOTES — THE ANOMALOUS INDORSER.** — *Held*, that the liability of a third person placing his name on the back of a note payable to the maker's own order, before or at the time of delivery by the maker, is presumptively that of a surety of the maker, but that it is open to such third person to show a different agreement between the parties. *Ewan v. Brooks-Waterfield Co.*, 45 N. E. Rep. 1094 (Ohio). See NOTES.

**CONFLICT OF LAWS — DETERMINATION OF NATURE OF FOREIGN STATUTE — PENAL LAWS.** — *Held*, the liability of a stockholder of a foreign corporation under the statute of the foreign State will not be enforced in Massachusetts unless the liability is held contractual by the courts of that State. *Coffing v. Dodge*, 45 N. E. Rep. 928 (Mass.). See NOTES.

**CONFLICT OF LAWS — DOMICILE — DIVORCE.** — A wife left her husband in New York and went into another State, where she secured a divorce and married another man. She then returned with him to the State of her former husband. *Held*, that the divorce and subsequent marriage were void. *McGown v. McGown*, 43 N. Y. Supp. 745.

It is generally conceded that a wife cannot acquire of her own accord a separate domicile from her husband's. *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; and as it is settled law that a divorce can be obtained only at the domicile, it was not improper to regard this divorce as invalid. 1 Bishop, Mar., Div., and Sep. § 837. And while it is the rule that the validity of marriage is determined by the law of the place of its consummation, Story, Conflict of Laws, 6th ed. § 113, for the New York court to recognize this subsequent marriage would be to consider the woman in the impossible relation of wife to two husbands. Story, *ib.*, § 373*f*.

**CONFLICT OF LAWS — FOREIGN STATUTE — ACTION FOR CAUSING DEATH.** — A statute of New Mexico provided that, whenever any person should be killed through the negligence of a railroad official in charge of a train, the corporation should forfeit and pay five thousand dollars, which could be recovered by the husband or wife or minor children of the deceased. *Held*, that the liability created by this statute would not be enforced in Kansas. *Dale v. A., T., & S. F. R. R. Co.*, 47 Pac. Rep. 521 (Kan.). See NOTES.

**CONSTITUTIONAL LAW — DEPRIVATION OF LIBERTY — RIGHT TO FREEDOM OF CONTRACT.** — The plaintiff became a member of a railway relief association, under an agreement that the acceptance of benefits therefrom for disability should operate as a release of all claims for damages against the defendant railway company. An Ohio statute purported to make such agreements void. The plaintiff, being injured by the negligence of the defendant, accepted aid from the relief association and then sued defendant. *Held*, he could not recover. The statute was unconstitutional, as depriving plaintiff of liberty, and also as class legislation. *Shaver v. Pennsylvania Co.*, 71 Fed. Rep. 931. See NOTES.

**CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — "LIBERTY."** — A Louisiana statute imposed a penalty on the doing of any act within the State to effect a contract of insurance in another State on property in Louisiana in a company which had not complied with the statutory requirements for doing an insurance business in Louisiana. In an action for the penalty, judgment had been rendered against the defendant. On error to the Supreme Court of Louisiana, *held*, the term "liberty," as used in the Fourteenth Amendment, secures not merely the right to freedom from physical restraint, but also the right "to pursue any livelihood or calling; and for that purpose to enter into all contracts which may be proper." The statute in question unwarrantably interferes with this right, and is therefore unconstitutional. *Allegeyer v. State*, 17 Sup. Ct. Rep. 427.

This is a notable decision, not merely on account of the importance and difficulty of the question of interpretation here decided, but also from the fact that inferences from some former opinions of the court seemed to indicate that the court was not inclined to accept this vague and comprehensive interpretation of the term "liberty." Cf. *Slaughter House Cases*, 16 Wall. 36. There was, however, a line of *dicta*, beginning in the opinions of the dissenting justices in the *Slaughter House Cases*, in which the broad interpretation of the term "liberty" had been approved. The discussion of the question of interpretation in the opinion in the principal case, confined as it is to the quotation of several *dicta* taken in the main from a dissenting opinion in the *Slaughter House Cases*, hardly seems adequate. The weight of the case is further lessened by the consideration that the decision might have been rested on the ground that the statute in question was an improper interference with interstate commerce.

CONTRACTS — SUBSCRIPTIONS — CONSIDERATION. — Plaintiff's intestate gave his promissory note, stated on its face to be "for the endowment" of the payee corporation. On the strength of such and other notes the corporation incurred liabilities. *Held*, that the note was valid. "The consideration is the accomplishment of the purposes for which the university was incorporated." *Irwin v. Lombard University*, 46 N. E. Rep. 63 (Ohio).

The decision is one in the law of charitable subscriptions, rather than in that of bills and notes. As cash and other such notes were given, and the court states that "the character of the obligation as a subscription is not affected by the fact that it is a separate paper," it seems that the note was given without any previous subscription. The present law seems to make the test of sufficiency of consideration "a detriment to the promisee." 8 HARVARD LAW REVIEW, 33. But even under the definition here adopted, viz. "a benefit to the promisor or a detriment to the promisee," it is difficult to see how a consideration is worked out. The case shows to what extremes a court will go to uphold the validity of such subscriptions, for the court, considering the law of Ohio to be settled, goes so far as to make up a subscription paper of separate promissory notes. See Anson on Contracts, 8th ed. 109, note, for the various theories. *Presbyterian Church v. Cooper*, 112 N. Y. 517, is *contra*.

CORPORATIONS — CAPACITY TO TAKE PROPERTY BY DEVISE OR BEQUEST ULTRA VIRES. — A corporation, created under a statute enabling it to take, by devise or bequest, property the income of which did not exceed a certain amount, was residuary devisee and legatee of property to a greater amount. On a bill by heirs and next of kin to construe the will, *held*, the question of the capacity of the corporation to take in excess of the statutory limit could be raised only by the State. *Congregational Society v. Everett*, 36 Atl. Rep. 654 (Md.).

The case follows a previous decision to the same effect. *Hanson v. Little Sisters of the Poor*, 79 Md. 440. (See 9 HARVARD LAW REVIEW, 350.) The court rests its decision squarely on the principle stated, though both this and the previous case could have been supported on other grounds, had the court so chosen. No distinction was taken between personality and realty. As to the former, the doctrine seems wrong on principle and authority. *In re McGraw*, 111 N. Y. 66. But as to the latter, the reasons for upholding the principle seem to outweigh the arguments advanced in opposition to it, for the corporation does not require the assistance of any court to get title, and the intent of the testator will be effected if it is a business corporation, and protected by equity if a charitable one, even if the State is limited in both to a decree of corporate death, a point emphasized by Peckham, J., in *In re McGraw* (*supra*). Furthermore, no principle of public policy appears to be violated. *Hamsher v. Hamsher*, 132 Ill. 273; 5 Thompson on Corporations, §§ 5787, 5795, are in accord. See 5 Thompson on Corporations, § 6033, and 9 HARVARD LAW REVIEW, 255, suggesting that in any case the question of *ultra vires* can be raised only by the State.

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — *Held*, on a trial for murder, where the defence is insanity, the burden of proving such defence is on the defendant, but he is not required to establish his defence beyond a reasonable doubt. *State v. Larkin*, 47 Pac. Rep. 945 (Idaho).

The ruling in this case and in the similar recent case of *State v. Scott*, 21 So. Rep. 272 (Ala.), is in accord with the practice in most States and with the majority of the text writers on the point. The rule is, however, a disputed one, and the better law would seem to be that of Michigan (*People v. Garbutt*, 17 Mich. 9) and several other States, as well as that of the Federal courts (*Davis v. U. S.*, 160 U. S. 469). These hold that the burden is upon the prosecution of proving both the elements of the crime, viz. the act and the intent to commit; and that while the general presumption is that the latter is present, if the accused brings forward any evidence tending to put that ques-



tion in doubt, the necessity for proof of this part of its case by the State is equal with that of proving the act itself.

**CRIMINAL LAW — SELF-DEFENCE.** — One who, on going to the house of another with the intention of committing adultery with the other's wife, arms himself for the purpose of self-defence if attacked by the husband, cannot avail himself of the right of self-defence to justify the killing. *Dabney v. State*, 21 So. Rep. 211 (Ala.). See NOTES.

**CRIMINAL LAW — SELF-DEFENCE.** — Where defendant and his companions with guns in their hands unlawfully entered a house in which deceased was a guest, and were ordered out by the latter, who followed them to the door, and was shot, an instruction that if the defendant in good faith abandoned the difficulty and was leaving the house, and deceased followed and pointed his gun, defendant had a right to defend himself even to taking life, if necessary, was properly refused. *Crawford v. State*, 21 So. Rep. 214 (Ala.).

The point of law is beyond dispute that a person cannot justify a homicide by the plea of self-defence, if the necessity for it results from his own wrongful act. But it is also equally well established that, if a person in good faith retires, he acquires the right of self-defence if assailed by the one he had previously attacked. The ruling in this case, that the withdrawal must be manifest, seems good law. The defendant having put the life of the deceased so in peril that he is under the necessity of using force, even to death, to defend himself, ought at his own peril to make it plain that that necessity no longer exists. This view is supported by *Parker v. State*, 7 So. Rep. 98 (Ala.).

**EVIDENCE — OPINION — MENTAL CONDITION.** — A witness, after stating many facts relating to a testator's conduct, and that the testator was personally known to him, was asked whether in his opinion the testator was competent to transact ordinary business. Held, that the answer was inadmissible as a conclusion involving expert knowledge. *Torrey v. Burney*, 21 So. Rep. 348 (Ala.).

By the better considered cases, a non-expert is now allowed to express his opinion as to one's insanity, provided he has set before the court sufficient facts on which to base his opinion. The decision in the principal case might well have been otherwise. The question asked was not a hypothetical one. Sufficient facts had been testified to by the witness, and he should have been allowed to state the impression they had made on his mind. This is opinion in form only; in substance it is a statement of fact. *Life Ins. Co. v. Lathrop*, 111 U. S. 612. It is difficult to see, on the facts of the principal case, any valid distinction between a question as to one's insanity and the question as to his competency. See *Wright v. Doe d. Tatham*, 5 Cl. & F. 670.

**EVIDENCE — PRIVILEGED COMMUNICATIONS.** — Held, in a suit between devisees under a will, that communications made by the testatrix to her counsel, respecting the execution of the will and a previous agreement of division, were not privileged. *Glover v. Patten*, 17 Sup. Ct. Rep. 411.

This is rather outside the rule that an attorney is not compellable to disclose the communications made to him by his client, than an exception to it. That rule has for its object the protection of the living in their business interests. It is plain that in the case of testamentary dispositions the ground for secrecy fails. It can be no disadvantage to the testator to have his intention made plain to the court, as between the devisees. Where, however, a third party is claiming against the representatives of the deceased client, the rule again applies. *Russell v. Jackson*, 9 Hare, 393.

**EVIDENCE — PROOF OF INTENTION.** — It being material to show that plaintiff's intestate intended to become a passenger on defendant's train, plaintiff offered declarations of the deceased, made about an hour before the train was to leave. Held, that the declarations were not admissible as part of the *res gestæ*. *Chicago & E. I. R. R. Co. v. Chancellor*, 46 N. E. Rep. 269 (Ill.).

A will was missing at the death of the testatrix. It had been left with a notary, but there was some evidence that it was last in possession of the testatrix. Held, that the presumption of revocation arising from these facts was rebutted by the declarations of the testatrix within three days of her death, that the will was with the notary. *In re Steinké's Will*, 70 N. W. Rep. 61 (Wis.).

The first of these cases is clearly wrong, in view of the more carefully considered modern authorities. The intention of the mind can only be shown by some external manifestation of which speech is an example. Where the manifestation is by speech, there is, of course, an element of hearsay in the evidence. But the speech is so nearly original evidence, that the usual objections to hearsay do not exist. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *Com. v. Trefethen*, 157 Mass. 180.

In the second case, the declarations were admitted as evidence that the testatrix died in the belief that the will was in existence, and that state of mind negated

the intention necessary in addition to the presumed destruction to constitute a revocation. On this ground the declarations were admissible, although if they had been offered to prove the existence of the will they would not have been admissible. These cases show that the term *res gesta*, used by the court in the Illinois case, has no application to proof of intention. *Re Valentine's Will*, 67 N. W. Rep. 12 (Wis.).

LOCALITY OF CRIME—CONSTRUCTIVE INTENT. — The defendants attempted to commit murder in Ohio by poisoning. Thinking the victim to be dead, they carried the body into Kentucky, and there beheaded it. In fact, the victim was alive until beheaded. *Held*, that the defendants were guilty of murder in Kentucky; and that acts done in another State are evidence admissible to prove the criminal intent. *Jackson v. Commonwealth*, 38 S. W. Rep. 1091 (Ky.). See NOTES.

PROPERTY—ADVERSE POSSESSION—PAROL GIFT. — *Held*, where the donee of lands under a parol gift goes into possession, and claims to be the owner, there is the beginning of an adverse possession against the donor. *Schafer v. Hauser*, 70 N. W. Rep. 136 (Mich.).

It has sometimes been thought that possession, to be adverse, must be against the will of the rightful owner, but there seems no reason why this should be necessary. The important thing is, that the adverse party should claim title for himself to the exclusion of the true owner. That the latter consents is immaterial; the adverse claimant is none the less holding in denial of any paramount title, and if he remains in possession for the statutory period, his right is complete. *Sumner v. Stevens*, 47 Mass. 337.

PROPERTY—ASSUMPTION OF MORTGAGE DEBT. — B mortgaged certain land to A, who assigned the mortgage to plaintiff. B transferred the property to C, who agreed to pay the mortgage. At maturity the mortgagee foreclosed, and took possession. The property was not worth the mortgage debt. On a bill to recover the deficiency, *held*, that he was entitled to a decree against both defendants, B and C, although he could have but one satisfaction. *Flint v. Winter Harbor Land Co.*, 39 Atl. Rep. 634 (Me.).

There is no doubt upon the authorities that the case is right. Many States, notably New York, proceed upon the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, but it is not necessary to resort to this anomalous doctrine. The promise of the grantee of the mortgagor is an asset or security of which the mortgagee is entitled, in equity, to avail himself. This is the view generally taken, and is the better doctrine. *Crowell v. Currier*, 27 N. J. Eq. 152. Where the mortgagor is solvent, it would seem that, inasmuch as the mortgagee has an adequate remedy at law, the only ground for supporting a recovery against the grantee of the mortgagor is to avoid multiplicity of action.

PROPERTY—EFFECT OF JUDGMENT ON TITLE. — Where a pledgee of securities wrongfully rehypothecated them, and after his insolvency the owner again obtained possession of them by paying the debt for which they were rehypothecated, *held*, that the fact that thereafter the owner recovered a judgment against the original pledgee for conversion of the securities did not vest title thereof in such pledgee. If the judgment represents the securities, the rights of the parties will be protected by requiring the owner to indorse a suitable credit on the judgment. *Union Pac. Ry. Co. v. Schiff*, 78 Fed. Rep. 216.

The decision is clearly right. The court carefully distinguish the case of *Dietz v. Field*, 41 N. Y. Supp. 1087, which seems to overrule the decision in *Goff v. Craven*, 34 Hun, 150, and which squarely supports the theory enunciated in 3 HARVARD LAW REVIEW, 326, viz. that since one who has been wrongfully dispossessed of a chattel has only a right to recover it in specie or its value, a judgment in any one of the forms of action operates like the statute of limitations to bar the owner's right to proceed against the converter, as a defendant cannot be twice harassed for the same wrong. The principle on which the decision is apparently rested is the oft-asserted one, that in an action of trover judgment merely does not vest title in the defendant. But many cases, e. g. *Lovejoy v. Murray*, 3 Wall. 1, 16, cited in the opinion, and the leading case of *Miller v. Hyde*, 161 Mass. 472 (see 8 HARVARD LAW REVIEW, 173), may be distinguished as not being cases between the parties to the judgment, the distinction taken in 3 HARVARD LAW REVIEW (*supra*). This decision is not inconsistent with the principles there stated, for the defendant had not one of the asserted essentials of title, viz. possession. Furthermore, the title is so far admitted to be in the plaintiff that the value of the securities is credited in the judgment.

PROPERTY—PURCHASER FOR VALUE. — *Held*, that where a mortgage is given to secure a past indebtedness, the lienholder is not protected against unknown equities. *Inglehuet v. Hunt*, 39 S. W. R. 310 (Tex.).

The decision follows the weight of authority in cases where the transfer is of land or



chattels. *Goodwin v. Mass. Loan Co.*, 152 Mass. 189. 2 Pom. Eq. Jur. § 749. But where the transfer is of negotiable paper, the taker is often considered, although inconsistently, as having given value. *Fisher v. Fisher*, 98 Mass. 303. The nature of the subject matter of the transfer can hardly be said to affect the question of consideration. The *dictum* of Story, J., in *Swift v. Tyson*, 16 Pet. 1, would seem to indicate that all such transfers were for value. The reason for this, if any, must be that the creditor has practically changed his position by reason of the added security. The New York courts take the opposite view. *Stalker v. M'Donald*, 6 Hill, 93. That a transfer in payment of an antecedent debt is for value would clearly seem to be the better opinion. *Swift v. Tyson*, *supra*; but see, *contra*, *Moore v. Ryder*, 65 N. Y. 438. For further cases on these questions, see 1 Ames's Cases on Bills and Notes, 650, n., 667, n.

PROPERTY — SURFACE WATER. — Defendant's railway embankment set back surface water upon plaintiff's land, causing damage. *Held*, that no action lies. *Walker v. Ry. Co.*, 17 Sup. Ct. Rep. 421.

The rule of the civil law is that the lower premises must receive the surface water which flows naturally from the higher; Pardessus, *Traité des Servitudes*, § 86, pp. 119, 120; and this has been followed in several States; *Martin v. Riddle*, 26 Penn. St. 415; *Gillham v. R. R. Co.*, 49 Ill. 484; *Ogburn v. Connor*, 46 Cal. 346. On the other hand, the doctrine of the principal case, that the owner of the lower land may, by changes in its surface, prevent surface water from coming from the higher, has long obtained in Massachusetts; *Luther v. The Winnisimmet Co.*, 9 Cush. 171; and has of late years been gaining in other States. *Bowlsby v. Spear*, 2 Vroom, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Swett v. Cutts*, 50 N. H. 439; *Barkley v. Wilcox*, 86 N. Y. 140. This view seems more conducive to the development of improvements on the land, which, in cases of this sort, is really the weightiest consideration. The authority of the present case will naturally have great influence in jurisdictions where the point is not settled.

PROPERTY — TRANSFER OF EXPECTANT INTEREST. — A transferred to his brother all his expectant interest in the estate of his mother, she being insane, and unable to assent thereto. The transaction was a fair one, and not made in order to defraud creditors. On the mother's death, A's creditors filed a bill to have the deed set aside. *Held*, that in such a case the ancestor's assent was not necessary. *Hale v. Hollon*, 39 S. W. Rep. 287 (Tex.).

In this class of cases, courts of equity have based their interference on two grounds: that fraud has been practised on the heir, and that the agreement is a fraud on the ancestor. In England the latter ground would probably be insufficient if the transaction be free from fraud in the sense that no advantage has been taken of the inexperience or needy condition of the heir, and that an adequate consideration has been paid. *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484. The public policy of a general rule requiring the ancestor's assent may well be doubted, but where, as in the principal case, and in *McClure v. Raben*, 133 Ind. 507, decided the other way, the ancestor is insane, the reason for it is gone, for he cannot change the course of the descent of the property, and with the reason should go the rule itself.

QUASI-CONTRACTS — AGENT'S COMPENSATION FOR SERVICES AFTER PRINCIPAL'S DEATH. — A principal employed an agent to collect his rents and to care for his real estate. The principal died intestate, and left no known heirs. The agent, with knowledge of the principal's death, continued to collect the rents and to care for the real estate. *Held*, that the decedent's estate must pay for these services. *In re Bryan's Estate*, 36 Atl. Rep. 738 (Pa.).

As death revoked the agency, and as there were no circumstances indicating ratification, the recovery must be worked out upon theories of quasi-contract. The requirements essential to a quasi-contractual recovery were present in this case, according to the court's view of the facts. Obviously, the former agent did not intend to serve without compensation. Obviously, too, he was no mere meddler; for, as the court explains, in the extraordinary state of facts he owed "at least a moral duty to look after the property for the real owner, whoever he might prove to be." Finally, the fact that the estate was actually benefited is apparently taken for granted in the court's statement that, according to the finding of the court below, the former agent "had rendered services to the estate." Indeed, though there is a surprising dearth of authority, it seems clear that the court's view of the law is correct, though there certainly is a question whether the facts indicate that the estate was benefited in the least. The facts are more fully reported at an earlier stage of the case, in 35 Atl. Rep. 571, and 176 Pa. 309.

TORTS — CONTRIBUTORY NEGLIGENCE — PROVINCE OF COURT. — *Held*, that in

an action for negligence resulting in personal injuries, where the facts are undisputed, contributory negligence is a question for the court, and not for the jury. *Town of Salem v. Walker*, 46 N. E. Rep. 90 (Ind.).

A judgment for plaintiff was reversed because the question had been left to the jury, although it was not stated by the court that the inference of contributory negligence was irresistible. The decision seems utterly indefensible, and is contrary to the almost universally accepted rule that negligence is an inferential fact, to be found by the jury from other facts, under proper instructions from the court as to the law. The case should go to the jury, unless the facts are undisputed, and only one inference is possible from them. A careful study of the cases shows that the rule laid down by the court is not law even in its own State. See *Citizens' St. R. R. Co. v. Spahr*, 7 Ind. App. 23; *Cincinnati, &c. Ry. Co. v. Grames*, 136 Ind. 39; and *Baltimore, &c. R. R. Co. v. Walborn*, 127 Ind. 142.

**TORTS—CONVERSION—BONA FIDE PURCHASER.**—A converted goods of B and sold them to C, who had no notice of B's title. *Held*, that C was not liable for conversion without proof of demand and refusal. *Stephens v. Meriden Britannia Co.*, 43 N. Y. Supp. 226.

This decision is in line with most of the New York cases, but it is against the great weight of authority, and can hardly be defended on principle. Since A could give C no title whatever, having none himself, C without legal justification exercised full dominion over B's goods, to which B had an immediate right of possession, and this is the essence of conversion. The argument based on the alleged injustice of holding a man liable who is guilty of no moral fault would, if carried to its logical conclusion, sweep away a large part of the law of torts. Probably most torts are committed under mistake. Even the New York cases would make C liable at once if he had resold the goods or consumed them; an utterly illogical distinction. See *Galvin v. Bacon*, 11 Me. 28; *Ames's Cases on Torts*, 286, note.

**TORTS—DECEIT—SCIENTER.**—*Held*, that, in an action for false warranty, *scienter* need not be alleged nor proved. *Wood v. Roeder*, 70 N. W. Rep. 21 (Neb.).

The case is a good example of the laxity that has crept into modern pleading, especially in code States, the declaration in its final form being so framed that it is impossible to say with any certainty whether it sounds in tort or in contract. If it be treated as a tort action, as the court seems to have treated it, to judge from the language of the opinion, the decision as to *scienter* is doubtful law. It is plainly based on the notion that where an action in contract could also have been brought, allegation or proof of *scienter* is not necessary in the tort action, a doctrine still prevalent in some jurisdictions, but repudiated by the best authorities. It is an anomaly in the law of deceit, having no basis in reason, but due to a confusion between the action in contract and in tort, coming down from the time when the action for breach of contract was treated as a tort action. See *Mahurin v. Harding*, 28 N. H. 128.

**TORTS—PUBLIC NUISANCE—SPECIAL DAMAGE.**—The defendant had unlawfully erected a fish trap in a navigable stream in such a way as to obstruct navigation and prevent the plaintiff from carrying on his business of fishing. *Held*, that the plaintiff suffered special damage, so that he was entitled to an injunction against such obstruction. *Morris v. Graham*, 47 Pac. Rep. 752 (Wash.).

This rule is generally stated to be, that, in order to give a private right of action for a public nuisance, the damage must be different in kind, not merely in degree, from that suffered by the public. Here the plaintiff was prevented from plying his customary trade, and in that his loss differed in kind from that of the public. The fact that the public also had the right to fish in the stream is immaterial, because they had never exercised it, and would suffer no loss, except in contemplation from its being interfered with. *Mill Co. v. Post*, 50 Fed. Rep. 429; *Rose v. Miles*, 4 M. & S. 101.

**TRUSTS—POWER.**—Testatrix, in accordance with a power given her under a settlement, devised land to her husband for life, adding the clause, "I give to him power to dispose of all such property by will amongst our children." The will contained no gift over in default of appointment. The husband died without exercising the power. *Held*, that the court is not bound, without more, to imply a gift to the children, and that the heir at law of the testatrix is entitled by force of the settlement. *In re Weekes' Settlement*, [1897] 1 Ch. 389.

In this case the land is disposed of by force of the settlement, so that the argument that the woman should not be left intestate is not present. The court, however, do not rest the case on that ground, but follow *Healy v. Donnelly*, 3 Ir. C. L. Rep. 213, in the view that unless it appears from the words of the power that it was the clear intention of the testator that the class should take in any event, they will not create a trust in favor of the



class. See also *Brook v. Brook*, 3 Sm. & G. 280, 282. The later Irish case of *Ahearne v. Aherne*, L. R. 9 Ir. 144, in which an opposite result was reached from practically the same words in the will creating the power, was unfortunately not discussed, though it seems irreconcilable. The principal case indicates a healthy reaction from the tendency of *Brown v. Higgs*, 4 Ves. 708, and *In re Caplin's Will*, 2 Dr. & Sm. 527, to spell out a trust on the slightest pretext.

**WILLS — COMPETENCY OF WITNESSES.** — A statute declared void all beneficial devises and legacies to subscribing witnesses. A will leaving all of testator's property to a corporation which was organized for charitable purposes was witnessed by two members of the corporation. *Held*, that the witnesses were competent, and the devise valid. *In re Will's Estate*, 69 N. W. Rep. 1090 (Minn.).

The case follows *Quinn v. Shields*, 62 Iowa, 129, and seems rightly decided. It was there said that, as the corporation was organized for charitable purposes, and not for the pecuniary benefit of its members, and as any claim of the witnesses to a share of the assets in case of dissolution of the corporation, was not only doubtful as a matter of law, but contingent on the dissolution, the existence of assets, and the life of the witnesses at the time of dissolution, there was no "present, vested, and certain pecuniary interest" in the devise to make the witnesses incompetent or interested. The common law rule as to "interest" for testing the competency of witnesses before a jury, is here applied to attesting witnesses, as it should be. *Hitchcock v. Shaw*, 160 Mass. 140; *Warren v. Baxter*, 48 Me. 193.

**WILLS — PROBATE OF JOINT WILL.** — *Held*, that a writing jointly executed by two persons, purporting to be their will, devising to a third person land, parts of which belong to each, can be proved as the separate will of one as to his part on his death, while the other is still living. *In re Davis' Will*, 26 S. E. Rep. 636 (N. C.).

Some courts have been startled by this sort of will, and it has been objected that no such testamentary instrument is known to the common law. See *Walker v. Walker*, 14 Ohio, 157. This difficulty of form is apparent rather than real. The meaning of the paper is, that it is the last will of each, so far as it relates to the property belonging to each. It is revocable by either party without notice to the other, and then stands only as the will of the party not revoking. Thus it has the ambulatory quality essential to a will. At the death of one party, the sensible course is that pursued in the principal case, to probate the instrument as his separate will. *In re Stracey*, 1 Deane, 6.

## REVIEWS.

**THE PRESUMPTION OF INNOCENCE IN CRIMINAL CASES.** By James Bradley Thayer, LL.D. Reprinted from Yale Law Journal, March, 1897. pp. 30.

Professor Thayer was the Storrs Lecturer at Yale for 1896; and this paper contains the substance of one of the lectures delivered by him in that capacity. His object in choosing the subject of the Presumption of Innocence, was to point out and examine critically the errors which were sprinkled so plentifully through the opinion of the court in *Coffin v. United States*, 156 U. S. 432. In that case "the Supreme Court of the United States had an opportunity to clear up the confusion and ambiguity that hang over the common talk about the presumption of innocence in criminal cases. The opportunity was sadly misimproved." Starting with this statement, Professor Thayer proceeds to examine the origin and history of the presumption, and to analyze keenly its true nature. The serious error, which originated perhaps in a careless statement in the first volume of Greenleaf, and which played so prominent a part in the opinion in *Coffin v. United States*, that the presumption is to be regarded by the jury as matter of evidence, is dealt with in a manner that seems to leave nothing unsaid. Professor Thayer has handled this subject, as he has so many other subjects connected with the law of evidence, in a way that must win the admiration of all students of law.

R. G. D.

THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES. By Sydney George Fisher. Philadelphia: J. B. Lippincott Co. 1897. pp. 393.

In this book Mr. Fisher undertakes to disprove the theory put into words by Mr. Gladstone when he said, "The American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." The author's main propositions are, that the national Constitution was the result of two hundred years of colonial experience; that, like the British Constitution, it was of slow and steady growth; and that its immediate sources were the colonial and revolutionary charters and constitutions, and not the governments of England or Holland. It must be admitted that Mr. Fisher has indubitably proved his case; but whether the task was as difficult or the result as novel as he seems to imagine may well be doubted. As a matter of fact, constitutional lawyers and scholars have for some time known that our Constitution, though the first working constitution to be reduced to the form of a written document, was yet the product of a selection of what had been found to be best and most practical in the colonial governments, and an avoidance of what had been shown to lead to bad results in the same, coupled with the necessity of compromise, which itself had no inconsiderable effect on the finally drafted instrument. Mr. Fisher, however, is entitled to the greatest credit for the admirable way in which he has handled the subject. His book is clear and readable, its arrangement is definite and systematic, and the manner in which every clause of the Constitution is traced and accounted for leaves nothing to be desired in point of convincing thoroughness. Especially good is the exposition of "Federalism." In the chapter on that subject the author satisfactorily shows the development of perhaps the fundamental idea of our Constitution; the action of the national government on the people directly, without working through the States, which are yet preserved as indestructible entities. Interesting, too, is the last chapter of the book, in which the author so effectually disposes of the theory that all that was good in our Constitution came from the Dutch, recently advanced by Mr. Campbell in his work "The Puritan in Holland, England, and America," as to make the latter gentleman appear almost ridiculous. Mr. Fisher's book will prove interesting to the general reader, and should be of use to the constitutional lawyer. It is of convenient size, neatly bound, well printed, and has an excellent index.

R. L. R.

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THE FEDERAL COURTS. Their Organization, Jurisdiction, and Procedure. By Charles H. Simonton, U. S. Circuit Judge. Richmond, Va.: B. F. Johnson & Co. 1896. pp. 120.

The contents of this little book are composed of lectures delivered by Judge Simonton before the Richmond Law School. The easy style of these lectures, and their freedom from unexplained technicalities, render them suitable for use by students who desire to prepare themselves for practice before the Federal courts, while by the aid of the index the book is made available for reference by the active lawyer. It appears by its form, which is practically continuous, with but few headings, to contain nothing but the lectures as originally delivered. The ground, however, seems to be thoroughly covered, and cases are quoted for the principal points.

R. G.



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## THEORY OF POST-MORTEM DISPOSITION: RISE OF THE ENGLISH WILL.<sup>1</sup>

AS the first step to any stable theory of the post-mortem disposition of property, whether by testacy or by intestacy, it must be observed that the idea of absolute property forever in any particular owner, as in the case of an estate to a man and his heirs forever, is a fiction, — a useful fiction probably, but still a fiction. A grant to a man and his heirs forever is a grant to each grantee forever; the "heirs" have nothing in the estate granted. The grant therefore is to the grantee as if he might live forever, which manifestly is impossible, so far as this present life is concerned; and it is certain that no man can take his property with him after death. There can be no such thing then as absolute property forever, in the true sense of the term.

It is no answer to say that a man may be considered to live in his posterity, or even, to put the case still stronger, that a man holds posterity in his loins; for either form of statement is as much a fiction as the one first mentioned. The childless man is conclusive of the point. Nor is it an answer to say that the owner of property may sell or exchange it for things consumable (if it be not consumable itself), and then consume the substitute; for in the case in hand the property, whether consumable or not, has not been consumed. Though it or some substitute might have been used up, as a matter of fact it has been left, and it is now to

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<sup>1</sup> Advance sheets of a work on Wills, in the Students' Series, by Melville M. Bigelow.

be disposed of at death. The answer supposed confuses the notion of "absolute" property, or one's *power* over things, with the duration of such power. As a mere matter of power, a man may certainly own property "absolutely."

Considered, however, as a theory, as it must be, how is the theory of ownership forever to be worked out? With cases of testacy there would be no difficulty; the testator is dealing with his own, and acting in person. In cases of intestacy the theory can only be worked out upon the idea of an implied agency in the State; the State acting for the owner in case of his failure to dispose of the property. But it is plain that such an agency can only stand upon a footing wholly unique and unlike any other. In the first place the supposed agency would be confined, as a matter of fact at least, to giving; it would not extend to selling or otherwise contracting. In the second place the supposed agency would go into operation where recognized agency ends, with the death of the principal. And in the third place the agency would be irrevocable. Agency cannot be stretched to such a point. And the same will be found true of any other term that may be used to do duty for the idea of acting for one who is defunct.

On what support then can a stable theory of post-mortem disposition be placed? Discordant answers have been suggested.

One answer is, that the title to property, subject to life ownership in a grantee, is in the State, and, but for the fact that the State has thought best to allow such grantee to designate the course of the property after his death, it would always revert to the State upon the death of the grantee. This view of the case, it may be noticed, has nothing to do with original ownership in the State, except inferentially; it proceeds upon the notion that the State has some sort of reversionary right upon the death of its grantee in fee and of each of his successors in ownership, because in the nature of things no man can hold property forever. The theory of perpetual ownership collapses the moment it is put to the test, according to this view. I hold to myself and my heirs forever, the grant declares; but after my death the property becomes the State's, though the State allows me, by some sort of agency, to dispose of it. That fact, however, has no bearing upon the soundness of the theory of State ownership.

What then are the facts upon which this last named theory rests or derives support? And how does the theory work out its result? These questions in order.



Intestate laws strike one first. The State regulates the disposition of property at the death of the owner if the owner fails to dispose of it. And it may be noticed that the owner may so fail, not merely by making no attempt, but by making an attempt that does not conform to law. How, it might be urged, can the State interfere in such a way except upon the footing of ownership? The act of disposition is an act of dominion. If the State does not become owner at the time of the State's action, then the State cannot give the property, except by an exercise of arbitrary power, which means robbery. Again, if the State does not acquire ownership at the death of the grantee, who does? Not ordinarily the next of kin, in the case of personalty; in most cases<sup>1</sup> the State hands the property over to the executor or administrator. Not the heir, it might be said, even in the case of realty; the State hands the property over to him.<sup>2</sup> The State so hands the property over even against specific legatees or devisees, though there is no reason in the nature of things why the legatees or devisees might not take directly subject to the claims of creditors.

Another fact which may be deemed to support the idea of State ownership is connected with what is called title by occupancy. The taking of really vacant property would seem to give to the taker ownership by natural right. But we are told that "this right of occupancy, so far as it concerns real property . . . hath been confined by the laws of England within a very narrow compass."<sup>3</sup> It seems to have been allowed, in real property, even at the first in but a single case, namely, in an estate for the life of another ("pur autre vie"), the tenant dying during the lifetime of that other person ("cestui que vie"). In such an event any one might enter upon the land and hold it during the unexpired period of the estate, that is, until the death of "cestui que vie." But this right was reduced almost to nothing in the seventeenth century by statute. That is, according to the view of State ownership,

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<sup>1</sup> Where, in the absence of debts against the estate, the property is found, after the late owner's death, in the hands of one who would be entitled to it, one need not take out letters of administration in order to acquire title. That is probably the effect of English statutes.

<sup>2</sup> The State, however, hands the property over to the executor, administrator, or heir as representing the deceased; hence the State cannot be said to act as owner in the transaction except in so far as interfering may be considered an act of dominion, and so of ownership; with which point compare the law of trover. The suggestion as to the heir is of course pure assumption.

<sup>3</sup> Blackstone, II. 257.

the State acted upon the principle or belief that the ownership had never been vacant; the entry of the new occupant was by mere permission, which the State now withdrew.

A more particular case, looking it may be thought towards State ownership, may be brought forward. Statutes exist touching any right of adopted children to inherit property of their parents by blood. Whether such children can so inherit is determined by statute; the State, it may accordingly be supposed, gives or withholds. To the suggestion that adopted children have no "natural" right to the property of a deceased parent by blood, the answer has been given from the bench that the suggestion is idle "for the reason that the statutory right is perfect and complete"; heirship being "not a natural, but a statutory right." Hence the State may increase the number of a man's heirs and cut down the shares of the others accordingly.<sup>1</sup>

These are a few out of many like instances that might be mentioned; but all may be comprehended in the statement that both intestate and testate disposition of property is a matter of statute; in other words, of regulation by the State. The State, it may therefore be thought, must be the owner; and besides, the State lives or may live forever, or at any rate it is expected to outlive the life of individuals, and therefore fulfils by possibility the requisite duration. And the State's grantee and his successors have permission or appointment, so the argument would run, to act instead of or for the State in disposing of property to pass at their death. We have, then, according to this theory, State ownership, with agency in the holder as a supplementary theory by which disposition post-mortem is worked out. Can this doctrine be put aside?

The question may be answered indirectly in the course of propounding another, and what appears to be the true, theory of law; which may be put thus: In the case of intestacy the State acts as an intermediary, in behalf of the public welfare. If no provision for the disposition of the property were made, the property at the death of the owner would become vacant, and a scramble would be apt to follow, the result of which would be as likely to be undesirable as the contrary. To prevent the property becoming vacant, the intestate, accepting a virtual offer by the State to act upon certain established terms, to wit, the intestacy statutes, — for in

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<sup>1</sup> *Wagner v. Wagner*, 50 Iowa, 532; *Abbott's Cases*, p. 123.



effect these are only an offer, — commits or leaves the property to the State, to distribute it upon those terms.<sup>1</sup> In this view the intestate has a well founded belief that the disposition which the State proposes is just and may save trouble, and possibly embarrassment and failure; and experience shows that in point of fact this is true in most cases, where attention has been called to the matter at all.

In the case of testacy it would seem at first that a theory actually prevails that the testator, in disposing of property owned by him absolutely, is disposing of his own, as much as when he gives or sells to take effect in his lifetime. But looking below the surface, this may after all be considered as merely concealing a distinction between ownership and title. The idea of testate disposition, when closely examined, appears to be no more than this, that, whatever may be true of ownership in the sense of holding and enjoying, a person's *title* may run on after the death of the person having it, wherever the grant or devise is to him and his heirs. Title accordingly means authority to dispose of; in that sense, obviously title may be severed from ownership, and indeed have no connection with it.

It may be objected that this is using the word title in a sense out of the ordinary, and making it do duty for an idea foreign to it. But that is not true, as appears from the legal phrase "right and title to convey"; at any rate, the word is easily capable of the meaning given to it; and when understood accordingly, it is consistent with the fact that ownership, in the sense of having and controlling in the name of ownership, comes to an end with the

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<sup>1</sup> "Occupancy," says Blackstone, II. 257, "is the taking possession of those things which before belonged to nobody. This . . . is the true ground . . . of all property. . . . But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and . . . actually took it into possession, should thereby gain the absolute property of it; . . . quod nullius est, id ratione naturali occupanti conceditur."

Speaking of estates *pur autre vie*, Fry, J. says that when such an estate "is given to a man, or to him and his heirs, the most he can take is an estate for his own life, and any one who comes in after him takes, not through him, but as occupant of the estate. Originally, any one who pleased was allowed to scramble for the occupancy after the death of the first taker, but this was found to be so inconvenient that he was allowed to appoint by will a special occupant. But still every one who came in after the first taker came in as an occupant, and not as deriving title through him." *In re Barber*, 18 Ch. D. 624, 627.

This fairly represents the state of things which the laws in general concerning post mortem disposition of property are intended to prevent.

owner's death, even though he holds "to himself and his heirs forever."

That fact should be emphasized; one's ownership or *having* necessarily comes to an end with death. What would then happen but for a power of disposition resting somewhere, where it could and ordinarily would be exercised so as to preserve and help on the social instinct which seeks to draw men together in the State,—that has already been suggested. The property would become vacant, and, according to its value, a thing to be scrambled for. Society, the very purpose and product of the social instinct, would be pulled apart upon the death of the first man having property enough to excite a scramble. To prevent such a catastrophe the absolute owner has "title" or authority to make a will, as the one most likely to act in accord with the social instinct; and in event of his failure to act, the State exercises the authority.

Thus disposition by testacy and disposition by intestacy stand upon the same footing, and are expressions of the same deep purpose, to wit, the prevention of a vacancy and the failure of what is the very foundation of society and order, the social instinct. They do not express any theory of State or individual ownership of property forever. The individual in the case of testacy, the State in the case of intestacy, is an intermediary.

If still the question is raised, from what source emanates the authority which confers ownership upon devisee, legatee, or distributee, the answer is, the social instinct.<sup>1</sup> The power of disposition is conferred upon the owner or upon the State; it does not emanate from either. Nor does it emanate from the social instinct as fictitious owner of the property; the power is the expression of the social instinct as a social and political necessity. Ownership is not a necessary condition to conferring ownership.<sup>2</sup> To maintain the social order, power or authority, without being synonymous with robbery or injustice, may act and confer ownership. So it does act, it is conceived, in the matter of post-mortem disposal of property.

It does not make against this theory that in early times, among

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<sup>1</sup> There lies the very source of law; law is only the drawing and keeping men together in society,—the fulfilling of the social instinct.

<sup>2</sup> That was a "marvellous thing" in the fifteenth century, when it was first seen that a mere direction to an executor to sell lands, which belonged by descent to the heir, could when acted upon by sale confer ownership. It was drawing "fire from a flint when there was no fire in the flint." Year Book, 9 Hen. VI. 24 b. But it is no marvel now.



our Germanic ancestors, property always fell to heirs after the tenant's death; that is, that a property owner could not make a will having any force or effect in regard to the descent of the property. For, to put the case in the usual way, the property belonged to the family, as a sort of corporation; while the family continued, the community had nothing in the property. It is a different way of putting it, but it is probably true, also, to say that the property fell from father to child rather than, through a vacancy, to the man who could first lay his hands upon it. It was better that the late tenant's kin should have it; and the only interest the community had in the matter was to see that the kin did have it. That interest on the part of the community was, however, the interest of self-preservation; not to regard it would be to invite anarchy to tear society to pieces.

It is obvious that the same was true in feudal England, when the right to make wills, admitted and practised of goods and chattels, was cut off in respect of land.<sup>1</sup> Except as original source of right, with right of escheat on failure of heirs, the State was not deemed owner, resuming its own upon the death of the tenant, and then making a gift of the property to the next taker. It acted then as before, and as at the present time, as an intermediary, to see that the social fabric should not perish. The transfer made was a transfer by rightful authority or power, not the gift of an owner.

Such appears to be the actual theory of the law. Still it is probably true, as has already been observed, that in the earlier period of the races which later became English, wills were not in use. The appearance of wills in the Germanic codes (the *Leges Barbarorum*) of a later time, was due to contact with Roman jurisprudence, and was borrowed from that source of civilization.<sup>2</sup> In the earlier period A's cattle, upon A's death, regularly passed to A's heirs, if he had any; A could not prevent it.<sup>3</sup> This fact directly raises another sort of question which the theory above presented naturally suggests, namely: Intestate disposition being the rule, how did disposition by will come about? *Whence* it came

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<sup>1</sup> Wills of land were lawful and in constant use in England before the Norman conquest (1066).

<sup>2</sup> See Maine, *Ancient Law*, c. 6, p. 189; Abbott, p. 19.

<sup>3</sup> "When the phenomena of primitive societies emerge into light, it seems impossible to dispute a proposition which the jurists of the seventeenth century considered doubtful, that intestate inheritance is a more ancient institution than testamentary succession." Maine, *Ancient Law*, c. 6, p. 189; Abbott, p. 19.

has already been noticed; it was the gift of Rome's expiring civilization to Rome's rude conquerors, awakened at last, by closer contact with that civilization, to a better life.<sup>1</sup> But *how* did the making of wills come to be allowed? Equality, at least among male children, and indeed among daughters in the absence of sons, was the inveterate principle of the Germans in their original abodes north and east of the then conquering eagles of Rome.<sup>2</sup> Wills necessarily implied inequality.

The process by which wills came to be recognized appears to have been as follows.<sup>3</sup> The earliest lawful wills of our Germanic ancestors were based, it seems, (1) upon failure of kindred near enough, that is, within the family, to take by the regular method, intestacy; or they were (2) gifts of property to which such kindred had no direct claim. To find the evidence for the first of these cases would take us too far afield into early Germanic usage; for evidence of the second, it is not necessary to go back to the earlier home of the English people. It is still true, many centuries after the migration, in Norman England. Lands acquired by inheritance as family domain were considered more or less like entailed property, that is, property in which the "heir" had a legal interest in the lifetime of the tenant, so that the heir's consent was necessary to any transfer even *inter vivos*.<sup>4</sup>

The words of inheritance in our modern deeds, "to A and his heirs,"<sup>5</sup> were, in their Latin form, "et suis hæredibus," first brought into use, in England in the twelfth or late in the eleventh century, following upon the establishment, effected towards the close of the eleventh century, of the (English) feudal tenures, in the case of feoffments or gifts of fiefs or feuds by lord to tenant. At

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<sup>1</sup> As to the wills in the Germanic codes, "they are almost certainly Roman. The most penetrating German criticism has recently been directed to these *Leges Barbarorum*, the great object of investigation being to detach those portions of each system which formed the customs of the tribe in its original home from the adventitious ingredients which were borrowed from the laws of the Romans. In the course of this process one result has invariably disclosed itself, that the ancient nucleus of the code contains no trace of a will. Whatever testamentary law exists has been taken from Roman jurisprudence." Maine, *ut supra*.

<sup>2</sup> Preserved in Kent in gavelkind, well called the common law of Kent.

<sup>3</sup> See Sir H. S. Maine, in the sixth chapter of his *Ancient Law*; also, *Abbott's Cases*, pp. 19 *et seq.*, where Maine is quoted at length.

<sup>4</sup> It is possible, though but barely possible, that there still survived a notion of the family as a corporation.

<sup>5</sup> The author is now using a note of his own to the fifth American edition by him of Jarman on Wills, II. 332.



the same time, it may be noticed, in immediate connection with these words of inheritance, reciprocal words declaring that the fief or feud was to be held of the feoffor "and his heirs" were introduced into the (oral or written) conveyance. The feoffment contemplated a relation forever between the donor and descendants and the donee and descendants.

In the times referred to, the "heir," as we have said, deemed himself in some sort included in the original gift of the lord, either as quasi tenant in tail, or as having some other interest of which he ought not to be deprived without his consent. In other words, the heir considered that he took, in modern phrase, by purchase. But the case was different in regard to lands which the ancestor had himself added to his estates by acquisition of his own.<sup>1</sup> With property so acquired the right of will-making, in regard to land, practically begins.

Testamentary disposition of personalty was everywhere much earlier, though not in western Europe, without important limitations. In the latter part of the thirteenth century Glanvill tells us that a man's goods were to be divided into three equal parts, one for his heir, another for his widow, the third to be at his own disposal.<sup>2</sup> If he died without a wife, he might dispose of one half,

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<sup>1</sup> In the *Customal*, known as the *Laws of Henry the First*, a book of the first half of the twelfth century, it is said that one who has bookland (land of inheritance conveyed by writing) from his "parentes" should not convey it away from his family. Henry I. c. 70, § 21; *Placita Anglo-Normannica*, *Intro.*, 44, 45, note. In the reign of the same king (1100-1135) a son confirms, or rather makes anew, a gift of land made by his father to the Church, which had been adjudged good against the son. *Placita Anglo-Norm.*, 128, 129. See also *Hist. Mon. Abingdon*, II. 136, anno 1104. About the year 1160 the Abbot of Abingdon sues a tenant named Pain "cum filio quem hæredem habuit" to recover fiefs forfeited, as alleged, by the father. Pain "et filius suus" entered into a concord with the abbot, and so terminated the suit. These were cases of gifts to the donee and his heirs.

Writing some twenty-five years later, Glanvill says that a man may make a will in his last sickness, "with the consent of his heir"; that he cannot "without his heir's consent" give any part of his inheritance to a younger son; and that he cannot disinherit "his son and heir" even as to land which he (the father) has bought, though if he have no heir of his body he may do as he will with such land. But he may convey a reasonable part of purchased property without consent of his bodily heir. *Lib. 7, c. 1.*

This special relation of the heir to his father's fief did not long survive the twelfth century, though traces of it appear in Bracton, who wrote in the reign of Henry the Third. See *Lib. 2, c. 6, fol 17 b*. The word "assigns,"—to the feoffee, his heirs and assigns,—which greatly helped alienation, was introduced into the feudal gift early in the thirteenth or late in the twelfth century.

<sup>2</sup> Glanvill, *Lib. 7, c. 5*. See *Magna Charta of John* (A. D. 1216), c. 26, of Henry III., 1216, c. 21, 1217, c. 22, 1224, c. 18; Bracton, 60 b; *Fleta*, *Lib. 2, c. 57, § 10*. So

the other half going to his children if any; if he had no children, his wife, if he had a wife, was to have half; and if he died without wife or children, he might dispose of the whole. Subject to differences of local custom, this continued to be true until the time of Charles the Second.<sup>1</sup> By this time personalty might be disposed of by will freely in the greater part of England,<sup>2</sup> the claims of the widow having continued, however, after those of the children had disappeared.<sup>3</sup>

The rise of primogeniture under feudalism in the Middle Ages appears to have created the occasion and demand for testamentary disposition. Originally, that is, before the fall of the Roman Empire, children among the German races, as we have seen, took equally; primogeniture, which of course destroyed all equality, was a thing of slow and gradual growth, beginning here and there with the feudal tie among the conquerors of Rome, and finally spreading over Europe; though not without admitting in various places some different custom, such as borough English, the converse of primogeniture, but equally fatal to the idea of equality among the children. And now, "as the feudal law of land practically disinherited all the children in favor of one, the equal distribution even of those sorts of property which [still] might have been equally divided ceased to be viewed as a duty."<sup>4</sup> And the way to carry out the owner's wishes, as a practical matter of method, was pointed out by Roman jurisprudence and usage. The clergy produced the Roman will, and used it as a model for the purpose in hand. The will has accordingly been called "an accidental fruit of feudalism."<sup>5</sup>

It should be added that primogeniture did not come into full operation in England until after the Norman conquest. On the

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some fifteen years before Glanvill, in the Constitutions of Cashel, c. 6 (A. D. 1172), introducing English law into Ireland; but saying "children" where Glanvill says "heir." Giraldus Cambrensis, *Conquest of Ireland*, Lib. 1, c. xxxiv. *Magna Charta*, Bracton and Fleta, *ut supra*, and *Regiam Maj.*, Lib. 2, c. 37, also say "children" instead of "heir." This casts a doubt upon the text of Glanvill; is it likely that primogeniture made such a great advance as that indicated by Glanvill, within a few years, and then, within another short time, fell back to its old position?

<sup>1</sup> See Blackstone, II. 491.

<sup>2</sup> The older usage of the common law, in favor of the widow and children, prevailed longer in Wales, in the province of York, and in London. *Ibid.*

<sup>3</sup> Maine, *Ancient Law*, c. 7, p. 217; Abbott, p. 26.

<sup>4</sup> Maine, c. 7, p. 217.

<sup>5</sup> *Ibid.* On the various stages of the English will, see Pollock and Maitland's *History of the English Law*, II. 312-353. That subject is beyond the present purpose.



Continent, however, it had gained full sway much earlier; hence we must turn to the Continent, as we have done, to find the statement true that testamentary disposition was due to primogeniture.<sup>1</sup>

Having now pointed out the origin of wills, a distinction should be noticed in the theory, or more properly in the very doctrine, of wills, between testamentary or intestate disposition of personalty and testamentary disposition of realty. The distinction is between taking under representation and taking under conveyance. An executor represents the testator; a legal or fictitious as distinguished from natural or true personality being assumed to exist in the executor and to continue until the duties committed to him have been performed. The legatee takes accordingly from a representative, or by "succession," to use a term of the Roman law. And the same is true of distributees in intestacy; they take from the administrator as representative.

In the case of realty, however, the devisee takes, by common law doctrine, as by a conveyance from the testator, though the "conveyance" takes effect, of course, only from the death of the testator, on the probate of the will. This operation of wills of realty will come out more clearly in the next chapter, where the testator will be seen in early times conveying his lands to another to uses such as he (the testator) may then or afterwards designate by will. But the full significance of this distinction will only appear in a later chapter; for the present it is enough to say that, at common law, devises are, in certain respects, governed by rules akin to those relating to conveyances *inter vivos*.<sup>2</sup>

Melville M. Bigelow.

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<sup>1</sup> Wills still appear to have a close connection in England with the position of the eldest son. It is stated that wills are frequently used there to aid or imitate that preference for the eldest son and his line which is a general feature in marriage settlements of land. Maine, *ut supra*. For the process and stages by which primogeniture came about, the reader is referred to the passages in the chapter in Maine's *Ancient Law*, above cited, and to the extracts from the same in Abbott's *Cases*, pp. 26-28.

<sup>2</sup> All this is consistent with the theory of wills above presented as the "true" one; for breaking through mere form and looking at the substance of things, as one may here do, it is still true that in the case of testacy the testator, in the case of intestacy the State, is but an intermediary acting for the common weal. The text at this point only shows how the mediation operates. There is nothing in the way the mediation works to affect the theory.

## CONSTITUTIONALITY OF THE SHERMAN ANTI-TRUST ACT OF 1890,

AS INTERPRETED BY THE UNITED STATES SUPREME  
COURT IN THE CASE OF THE TRANS-MISSOURI  
TRAFFIC ASSOCIATION.

THE decision of the Supreme Court of the United States in the case of the Trans-Missouri Traffic Association for the first time authoritatively declares the intended scope of the provisions of the so called Anti-Trust Act of 1890. In view of such interpretation of the statute, it is now the legal presumption that it was the intention of Congress to prohibit and render criminal every contract in restraint of trade or commerce among the several States or with foreign nations. It matters not how reasonable such a contract may be, how necessary for the protection of the property rights of the contracting parties, how beneficial to the community at large, — all alike are prohibited. As to almost all trading and commercial intercourse among the States, and as to every contract for the export or import of merchandise, the people by this statute may be arbitrarily and unreasonably deprived of liberty to trade and freedom of contract in the pursuit of their ordinary avocations by what were heretofore entirely legitimate business methods. Nearly every commercial contract to some extent restrains and limits trading on the part of the contracting parties. The avowed object of the statute was to prevent only unlawful restraints of trade, but it creates the greatest restraint ever put upon an enlightened people in depriving them of freedom of trade and liberty to contract for the proper, necessary, and essential protection of their own interests. Americans living under a republican form of constitutional government, with supposed inalienable rights and the broadest privileges of individual liberty, are placed by the Trust Act under the ban of illegality and made criminals for doing that which is lawful within their own States and anywhere else in the civilized communities of the world. It is, therefore, not surprising that the realization of the intended scope and legal effect of this statute should have caused dismay in the commercial world, and have created profound misgiving as to the future.



In the dissenting opinion, Mr. Justice White has shown that the Trust Act so interpreted is not only arbitrary and unreasonable, but is "violative of the elementary principles of justice." It is only two years since the Chief Justice of the United States said,<sup>1</sup> in considering this very act, that "acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even *doubtful constitutionality*." In *Allgeyer v. Louisiana*,<sup>2</sup> Mr. Justice Peckham had lately said, speaking of a State statute restraining insurance contracts, "Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform." The inquiry is therefore suggested whether legislation of Congress which arbitrarily and unreasonably deprives persons of liberty to trade and freedom of contract is not in violation of fundamental individual rights and liberties guaranteed by the fifth amendment of the Constitution of the United States, and whether the so called Trust Act of 1890, as now interpreted, is not unconstitutional and void.

No question could be more momentous than this exercise of federal power, in view of its tendency towards centralization and socialism, and of the vast interests which seem to be threatened. The importance of the subject demands the fullest investigation and the broadest discussion of every point or aspect that can be presented. Such a question is the concern of every citizen. Signs are not wanting that further encroachments upon individual liberty will be attempted. From arbitrary and socialistic measures in any State there is escape into some other and more conservative or enlightened State, but from such federal legislation there is no refuge except expatriation. A policy so inimical to progress and commerce may drive capital into Canada, whose railroads already compete ruinously with our own.

The business interests of the country and all concerned in commercial enterprises and investments must realize that, if the principle of this act be extended, there will be no protection except what may be found in the discretion or moderation — if not the whim or caprice — of the ever changing legislative majority. That should be an intolerable condition in a society professing to exist

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<sup>1</sup> *United States v. E. C. Knight Co.*, 156 U. S. 1, 13.

<sup>2</sup> Decided March 1, 1897; 17 Sup. Ct. Rep. 427, 432; 165 U. S. 578, 591.

under a fixed and enduring constitutional government. This apprehension as to the danger of despotic and prejudicial legislation by Congress is not groundless. As so well stated in a famous case by Judge Earl of the New York Court of Appeals: <sup>1</sup>—

“Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one.”

What is the extent of the power of Congress to regulate commerce? Are there no limitations? May not there be such a perversion of the power as to require the nullification of the attempted legislation? Surely, this power to regulate cannot involve the power to destroy. The theory of our government is opposed to the deposit anywhere of unlimited power, unrestrained by the established principles of private rights. No legislative powers in Congress or in the State legislatures are absolute and despotic. Arbitrary and unreasonable federal laws depriving individuals or corporations of their property rights or of freedom of contract conflict with the fifth amendment of the United States Constitution, just as similar arbitrary and unreasonable State laws are nullified by the fourteenth amendment.

The question argued and decided in the *Trans-Missouri* case was as to the legal import of the words used in the statute. The Supreme Court decided that the language was plain and unlimited, and seems to have declined the task of making by judicial construction a law which Congress did not enact. Its province was to interpret general language of the broadest scope, and the majority felt that they could not justify reading into the act a limitation which Congress had declined or omitted to insert. But the court did not consider or decide any question as to the constitutional power of the legislative body to pass so despotic and arbitrary a measure.

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<sup>1</sup> *Matter of Jacobs*, 98 N. Y. 98, 114.



The first ten amendments of the Constitution of the United States were framed to declare the bill of rights of the people of the United States, and were designed as restraints upon the national government.<sup>1</sup> These amendments originated in the fear of the people that powers not intended to be granted would be claimed by the national government, and that there might be an arbitrary and unreasonable exercise of the authority which had been conferred.<sup>2</sup> The people instinctively dreaded any form of undefined power over their liberties and property.<sup>3</sup> The fifth amendment then adopted applies solely to Congress, and provides that "No person shall be . . . deprived of life, liberty, or property without due process of law." This provision asserts one of the essential immunities of the individual against the legislative, executive, and judicial acts of the general government. It declares a right which "is a large ingredient in the civil liberty of the citizen."<sup>4</sup> When almost eighty years later the fourteenth amendment was framed to restrain the States, the same language was used, and under it have proceeded the decisions which have declared void all unreasonable and arbitrary State legislation violating the requirement of due process of law. In the *Sinking Fund Cases*, Chief Justice Waite said that "the United States equally with the States are prohibited from depriving persons or corporations of property without due process of law."<sup>5</sup>

It is true that the protection of the fifth amendment has rarely been invoked or discussed during our national existence of over a century, but the explanation lies in the fact that Congress seldom has legislated so as to come in conflict with or to invade individual rights.

Such legislation by the States under the guise of the police or taxing power, however, is being constantly challenged, and at every term of the Supreme Court the docket is crowded with cases arising under the fourteenth amendment. There is a great difference between the commercial power vested in Congress and the police power retained by the States.<sup>6</sup> The distinction between these

<sup>1</sup> *Barron v. Baltimore*, 7 Pet. 243, 247; *Spies v. Illinois*, 123 U. S. 131, 166.

<sup>2</sup> *Livingston v. Mayor*, 8 Wend. 85, 100; *McCulloch v. Maryland*, 4 Wheat. 316, 433; *Curtis, Const. History*, U. S. 159; *Slaughter House Cases*, 16 Wall. 36, 82.

<sup>3</sup> 25 *Am. Law Review*, 880.

<sup>4</sup> Mr. Justice Bradley in *Butchers' Union Company v. Crescent City Company*, 111 U. S. 746, 762.

<sup>5</sup> 99 U. S. 700, 718.

<sup>6</sup> *Railroad Company v. Fuller*, 17 Wall. 560, 568.

powers may be perplexing and difficult to explain, but the courts constantly recognize and observe it.

This historic term, "due process of law," or its equivalent, "the law of the land," under which our race for centuries has been shielded from oppression, and which embodies the foremost of our liberties—regarded even in England as a constitutional right—is not to be narrowed or dwarfed into mere protection against physical restraint of the person or deprivation of the possession of lands or chattels; it embraces every right to individual liberty, to use one's faculties in all lawful ways, to live and work where one will, to pursue any lawful trade or avocation, and to contract in all lawful ways.<sup>1</sup> In the language of Mr. Justice Brewer, "Among the inalienable rights of the citizen is that of the liberty of contract."<sup>2</sup> As the Court of Appeals of New York has said: "It is not necessary, at this day, to enter into any argument to prove that the clause in the bill of rights that no person shall 'be deprived of life, liberty, or property without due process of law,' is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense, against unlawful invasion by the government, in the exertion of governmental power in any of its departments, but also protects every essential incident to the enjoyment of those rights."<sup>3</sup> The liberty to adopt and follow a lawful industrial or commercial pursuit is certainly "infringed upon, limited, perhaps weakened or destroyed, by such legislation" as the Trust Act, which renders it criminal for individuals or cor-

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<sup>1</sup> In referring to the liberty mentioned in the fourteenth amendment, Mr. Justice Peckham said, in *Allgeyer v. Louisiana*, *supra*, that "the term is deemed to embrace the right of the citizen . . . to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Judge Charles Swayne (*In re William Grice*, U. S. Circuit Court, District of Texas, February 22, 1897), in holding the Anti-Trust Law of Texas to be void under the fourteenth amendment, said: "It is not necessary to argue that the constitutional privileges which protect the citizen in his life, liberty, or property entitle him . . . to do anything and enter into all contracts usual and necessary in the ordinary avocations of production, manufacture, and trade. Neither the State nor the national legislature possesses any right to limit these natural privileges of contracting or conducting business. Any law which undertakes to abolish these rights, the exercise of which does not involve infringements upon the rights of others, or to limit the exercise thereof beyond what is necessary to provide for the public welfare and general security, cannot be included in the police power of the government."

<sup>2</sup> *Frisbie v. United States*, 157 U. S. 160, 165.

<sup>3</sup> *People v. King*, 110 N. Y. 418, 423.



porations to pursue legitimate business methods, or to make reasonable contracts for the protection of their property rights. If such a regulation of trade had been decreed by the Crown of England before the Revolution, would it not have been declared void because infringing the individual rights of the subject? In 1711, the Chief Justice of England (Parker, C. J., subsequently Lord Macclesfield) referred in the case of *Mitchel v. Reynolds*<sup>1</sup> to the provision of Magna Charta, *Nullus liber homo, etc., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, etc.*, and said, "These words have been always taken to extend to *freedom of trade*."

In New York, the principles of constitutional law, which guarantee freedom of contract, have been repeatedly recognized and enforced, and the true doctrine declared in opinions that leave little to be added. The Jacobs case<sup>2</sup> in 1885, argued by Mr. Evarts, resulted in a decision declaring void the act prohibiting the manufacture of cigars, etc. in tenement houses, on the ground that it deprived the people of rights of property without due process of law. The opinion of Judge Earl in this case is commonly regarded as the strongest presentation of the subject to be found in the reports. It was followed during the same year by the Marx case,<sup>3</sup> in which the oleomargarine law of 1884 was held unconstitutional, the opinion being delivered by Judge Rapallo, who pointed out the folly of permitting such precedents, and said that "measures of this kind are dangerous even to their promoters." Three years later, in the Gillson case,<sup>4</sup> Mr. Justice Peckham delivered the unanimous opinion of our Court of Appeals, holding unconstitutional a statute prohibiting what are known as "gift sales," and said: —

"It seems to me that to uphold the act in question upon the assumption that it tends to prevent people from buying more food than they may want, and hence tends to prevent wastefulness or lack of proper thrift among the poorer classes, is a radically vicious and erroneous assumption, and is to take a long step backwards, and to favor that class of paternal legislation which, when carried to this extent, interferes with the proper liberty of the citizen and violates the constitutional provision referred to. Equally unfounded, and for practically the same reasons, is the assumption that the law is valid as a law regulating trade and for the prevention of fraud and deception. It has no tendency to prevent either, *and its regulation of trade is a mere arbitrary, unreasonable, and*

<sup>1</sup> 1 P. Williams, 181.

<sup>2</sup> 98 N. Y. 98, 102.

<sup>3</sup> *People v. Marx*, 99 N. Y. 377, 387.

<sup>4</sup> *People v. Gillson*, 109 N. Y. 389, 405.

*illegal interference with the liberty of the citizen in his pursuit of a livelihood by engaging in a perfectly valid business, conducted in a perfectly proper manner."*

In Pennsylvania, Massachusetts, Ohio, Illinois, Michigan, Missouri, West Virginia, and other States, similar decisions are to be found, and a few examples may be mentioned. A statute was enacted in Pennsylvania forbidding manufacturers from paying wages in orders, and it was held to be unconstitutional and void as being an attempt "by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts."<sup>1</sup> In Massachusetts, an act forbidding the employer from imposing fines upon employees, and withholding wages because of defects in their work, was held unconstitutional as in violation of fundamental rights.<sup>2</sup> The United States Circuit Court in Ohio lately declared unconstitutional a statute forbidding railroad companies from contracting with employees in respect of personal injuries;<sup>3</sup> and in the Ohio Supreme Court last December an act relating to mechanics' liens was held to be void on the ground that it interfered with the constitutional right of contract.<sup>4</sup> In Illinois, several statutes have been set aside upon similar grounds, as may be seen by reference to the cases nullifying the "truck store" act, the "coal-weighing" act, and other legislation.<sup>5</sup> The Michigan courts are equally emphatic in declaring that the right to freedom of contract must be preserved; that this right to contract is included in the right to liberty, and that it is likewise a right of property.<sup>6</sup> Several interesting cases will be found in Missouri holding statutes unconstitutional because attempting to deprive the people of liberty to contract.<sup>7</sup> In one of the decisions, the court said, that the law could not be sustained "unless indeed the doing of such act guaranteed by the organic law the exercise of a right of which the legislature is forbidden to deprive him can, by that body, be conclusively pronounced criminal."<sup>8</sup> The court

<sup>1</sup> *Godcharles v. Wigeman*, 113 Pa. St. 431; see also *Waters v. Wolf*, 162 Pa. St. 153.

<sup>2</sup> *Commonwealth v. Perry*, 155 Mass. 117.

<sup>3</sup> *Shaver v. Penna. Co.*, 71 Fed. Rep. 931, 936.

<sup>4</sup> *Palmer v. Tingle*, 45 N. E. Rep. 313.

<sup>5</sup> *Frorer v. People*, 141 Ill. 171; *Ramsey v. People*, 142 Ill. 380; *Harding v. People*, 160 Ill. 459.

<sup>6</sup> *Kuhn v. Common Council of Detroit*, 70 Mich. 534; *Spry Lumber Co. v. Trust Co.*, 77 Mich. 199.

<sup>7</sup> *State v. Loomis*, 115 Mo. 307, 312.

<sup>8</sup> *State v. Julow*, 129 Mo. 163, 175.



then added: "We deny the power of the legislature to do this; to brand as an offence that which the Constitution designates and declares to be a right, and therefore an innocent act, and consequently we hold that the statute which professes to exert such a power is nothing more nor less than a 'legislative judgment,' and an attempt to deprive all who are included within its terms of a constitutional right without due process of law." In Colorado, the Supreme Court furnished to the legislature an opinion on the validity of proposed legislation, in which among other things it was said, "The bill submitted also violates the right of parties to make their own contracts, a right guaranteed and protected by the fourteenth amendment to the Constitution of the United States."<sup>1</sup> Similar principles will be found announced elsewhere; and indeed illustrations and reference might be indefinitely multiplied, all tending to establish that such a State statute as the Trust Act of 1890 would be held unconstitutional as conflicting with the fourteenth amendment.<sup>2</sup> If such a law would be unconstitutional because arbitrary and unreasonable, when passed by a State legislature with reference to its internal trade, it must follow that similar legislation on the part of Congress with reference to interstate commerce is equally void, and for substantially the same reasons.

Prior to the passage of the so called Trust Act in 1890, the doctrine of the old common law in relation to the invalidity of contracts in restraint of trade had been considerably modified. The Supreme Court had, in 1889, declared that the rule originated under a condition of things and in a state of society different from those which now exist, and had declared that the question always was whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the agreement was or was not unreasonable. The doctrine that a contract in restraint of trade is void as against supposed public welfare or public policy was founded upon two grounds. One was the injury to the public by being deprived of the restricted party's industry; the other was the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. But if neither of these evils ensued, and if the contract was founded on a valid consideration

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<sup>1</sup> 39 Pac. Rep. 328.

<sup>2</sup> E. g. *State v. Goodwill*, 33 W. Va. 179. 181; *Ex parte Kuback*, 85 Cal. 274; *Low v. Rees Printing Co.*, 41 Neb. 127, 136.

and afforded a reasonable ground of benefit to the other party, it was free from legal objection, and was always enforced. This was the law as declared by the Supreme Court in two leading cases.<sup>1</sup> We should not fail to observe the difference between a rule or policy of the courts refusing help to enforce contracts in unreasonable and unnecessary restraint of trade, or to grant damages for their breach, thus leaving the parties to make and terminate the agreement at will, and a law which ordains that such agreements, even when reasonable and just and not injurious to the public, shall constitute criminal offences. This difference is as broad as a gulf.

The books furnish many illustrations of contracts between individuals in restraint of trade which involve no public interest whatever, and which have been adjudged uniformly in England and in almost every State to be lawful because reasonable and necessary and in no sense injurious to the public welfare. Yet now, by the Trust Act, such agreements are made crimes, punishable by imprisonment and fine, if their subject matter involve commerce between the States, or with foreign nations. It has been suggested that the power of Congress and the operations of the Trust Act may be limited to the regulation of the transportation of articles between the States, and that there is little else for this act to take effect upon. But is this not an erroneous view? Chief Justice Fuller seems to have decided the contrary. To quote from his opinion in the Knight case: <sup>2</sup> "Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

The extreme danger of intermeddling with trade and industrial pursuits has been frequently emphasized by judges, statesmen, and writers upon political economy. The forms of commercial intercourse and business methods are perpetually varying. Undue innovations interfering with the natural course of trade may be destructive and may paralyze business, while professing to free it from restraints. Sir William Erle, in his essay on the Law Relating to Trade Unions, speaking of the right to contract freely and

<sup>1</sup> *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 406; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 68.

<sup>2</sup> *United States v. E. C. Knight Co.*, 156 U. S. 1, 13.



of efforts to regulate restraints of trade, forcibly said:<sup>1</sup> "An attempt to adjust them by statute may succeed, if the authors and interpreters of the statute understand the principles of the common law, and in some degree incorporate them. Without that process, the interpretation of the words of a statute merely by a dictionary leads often to unsatisfactory results. Even if the statute is well drawn, society soon progresses beyond it, and the need of the principles of the common law is constantly renewed."<sup>2</sup>

The governmental power of regulation has been limited and restricted in analogous cases. Twenty years ago, during the Granger movement, the Elevator case in the Supreme Court (*Munn v. Illinois*<sup>3</sup>) caused as great a sensation and created as much alarm as the present decision. The court decided that a State legislature could control the use of the property and regulate the charges of corporations or individuals engaged in any business "clothed with a public interest," as the phrase put it. Many then believed that the rule announced was subversive of the rights of private property. Well founded fears arose that the decision would be followed by legislation ruinous to many enterprises, destructive of all security of investment, and confiscatory in its effects. Such legislation came, and vast damage resulted. It was aimed principally at railroads, which represent property interests exceeding those of any other branch of business, and at various other corporate enterprises. Finally, the intermeddling regulations became so irksome and destructive, and the rates imposed so arbitrary and unreasonable, that the *Munn* case had to be modified and limited, and the doctrine recognized and enforced that the power in the State legislatures to regulate any such business and to limit charges was not unlimited or without effective restraint. The court declared through Chief Justice Waite, in the so called Railroad Commission Cases, that "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."<sup>4</sup> Then, in the Minnesota Railroad Commission Cases, the Supreme Court set aside the State law because authorizing the imposition of unreasonably low rates, on the ground that such legislation de-

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<sup>1</sup> *Vide* pp. 12, 47.

<sup>2</sup> Lord Esher, Master of the Rolls, said (23 Q. B. D. 606) that this essay of Sir William Erle was "more full of careful and accurate law than is to be found in many judgments," and Mr. Justice Harlan quoted from it with approval in his dissenting opinion in the *Knight* case, 156 U. S., at p. 24.

<sup>3</sup> 94 U. S. 113.

<sup>4</sup> Railroad Commission Cases, 116 U. S. 307, 331.

prived the railroad companies of property rights without due process of law.<sup>1</sup> The power of regulation, which, according to the doctrine of *Munn v. Illinois*, existed in the State legislatures, had to be restricted by the Supreme Court within just and reasonable limits, and the courts held to have the ultimate power of review. So, in the present case, the power of Congress to regulate commerce must be subject to judicial review, and should be limited to reasonable regulations. At the present term of the Supreme Court, Mr. Justice Harlan, in the *Covington Turnpike* case,<sup>2</sup> delivering the unanimous opinion of the court, reiterated the doctrine, and declared upon the authority of previous decisions that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

Another illustration of limits upon governmental powers will be found in the classification cases. It has been repeatedly decided that the States have power to classify property and business for purposes of legislative regulation or taxation, but the Supreme Court has declared that such classification cannot be arbitrary, and must always rest upon some differences which bear a reasonable and just relation to the matter in respect of which the classification is proposed, and can never be made unreasonably and without any such basis. To use language quoted by Mr. Justice Brewer in a late case: "Such classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."<sup>3</sup>

It may be conceded that, under the doctrine of *Munn v. Illinois*, the legislative power of control, regulation, or restraint over railroad and other quasi-public corporations or monopolies is much broader than in respect of individuals and private trading corporations; but, with all deference, no such consideration can uphold the

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<sup>1</sup> *Chicago, &c. Railway Co. v. Minnesota*, 134 U. S. 418; see also *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.

<sup>2</sup> *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 592.

<sup>3</sup> *Gulf, Colorado, & Santa Fé Ry. v. Ellis*, 165 U. S. 150, 156.



Trust Act. The test of constitutionality is not what may be legitimate as to the particular individuals or corporations before the court, but what may be done within the scope and intention of the statute, or be asserted under its authority.<sup>1</sup> If unconstitutional as to one, the lowliest or the richest, it is unconstitutional as to all. We must judge the law by what it purports to ordain as to individuals engaged in private business pursuits. That is the test of its constitutionality. Can individuals be deprived of liberty of contract in this arbitrary manner? Can they be prevented from entering into reasonable contracts "which may be proper, necessary, and essential" to carrying on a legitimate business, or made criminals for doing what is not injurious to the public, and what has been declared for two centuries here and in England to be lawful and proper? Are they to be prevented from making reasonable contracts in limited and partial restraint of trade? The Trust Act is entire and indivisible; it says "*every contract*." It cannot be constitutional as to railroads and void as to others coming within the legal import of the unlimited term "*every contract*" as interpreted by the court. Indeed, it would be a strange result if this statute, believed by most people at the time of its passage not to apply to railroad corporations, should by legal construction be declared to be valid only as to railroads. The Trust Act, if unconstitutional as to the contracts of individuals and private trading corporations, is wholly void and must be set aside. It is too broad. This point arose in the Trade-Mark Cases,<sup>2</sup> and it was held that the statute there in question was wholly unconstitutional, because too comprehensive in its scope.

It was then urged that, as Congress had power to regulate trade-marks used in commerce with foreign nations and among the several States, the trade-mark statutes might be held valid in that class of cases, if no further; but Mr. Justice Miller in delivering the decision of the Supreme Court held the acts wholly void, and said that, "while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may

<sup>1</sup> *Stuart v. Palmer*, 74 N. Y. 183, 188; *Montana Co. v. St. Louis Mining Co.*, 152 U. S. 160, 170.

<sup>2</sup> 100 U. S. 82, 98.

be punished which are not described in language that brings them within the constitutional power of that body."

The reasoning in the cases mentioned above certainly applies with great force and pertinency to the Trust Act of 1890. In legislating under the police power, the States exercise governmental functions of the highest order, and of a class which the courts will not and ought not to interfere with except in the clearest cases of abuse. Much legislation that seems like intermeddling in private business is upheld because possibly justifiable under some idea of police regulation. But such legislation must have a legitimate end in view, and some fair relation to the health or morals of the community. The power of Congress to regulate commerce, however, is not as broad or as far reaching as the police power of the States, and an act valid under the police power of the States might be unjustifiable, arbitrary, and void as a federal regulation of commerce.

There can be no reasonable doubt that every governmental power in the States or in the federal government must be exercised in subordination and subject to the fundamental rights of the people. Arbitrary and unreasonable regulations cannot be tolerated.

Whatever a State or Congress may enact as a sovereign government in exercising any power, it must do in subordination to the inhibitions of the Federal Constitution, inhibitions which furnish — as Attorney General McKenna lately said in deciding as United States Circuit Judge the California Railroad Commission case — "a doctrine, rational, consistent, safe, giving to property and all interests in it protection against an arbitrary will, and not denying or dissipating the safeguards of the Constitution by refined and metaphysical distinctions."<sup>1</sup>

The constitutional question as to the power of Congress is not mentioned in the opinion of Mr. Justice Peckham in the *Trans-Missouri* case, or in the dissenting opinion of Mr. Justice White. In view, however, of the vast importance and far reaching effect of this legislation as it now appears in the light of its construction by the court and interpreted as the prevailing opinion has been interpreted in the dissent of Mr. Justice White and in the forum of public opinion, it is to be hoped that a decision will be promptly obtained upon the vital proposition, whether, under the guise of regulating

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<sup>1</sup> *Southern Pac. Co. v. Board of Railroad Com'rs*, 73 Fed. Rep. 235, 256.



commerce, Congress can unreasonably and arbitrarily restrain trade and commercial intercourse without violating the fifth amendment. The present decision may, at any rate, be explained and limited so as to remove the grave danger of misinterpretation and misapplication.

Mr. Justice Brewer has well said : —

“The first official action of this nation declared the foundation of government in these words: ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.’ While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.”<sup>1</sup>

Theories or notions of public policy cannot limit or regulate our constitutional rights. The public policy of one generation seldom remains that of its successor, and the prevailing opinion of one section of the country is frequently radically opposed to that of another. As has been quaintly said, public policy is an “unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law.”<sup>2</sup> The pretence of public policy is ever the mask of reckless politicians competing for the unthinking vote. It is the deadly weapon of socialism and communism. The very object of constitutional restrictions is to establish rules which cannot be varied according to the passion or caprice of a legislature, or the public policy of the hour, and to fix an immutable standard applicable at all times and under all circumstances. When the Constitution speaks, its voice must be heeded, though clashing with the views or wishes of the temporary majority. The paternal theory of government should be odious to us. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, are both the

<sup>1</sup> *Gulf, Colorado, & Santa Fé Ry. v. Ellis*, 165 U. S. 150, 159.

<sup>2</sup> *Burrough, J.*, in *Richardson v. Mellish*, 2 Bing. 229, 252.

limitation and the duty of government.<sup>1</sup> Nor can we protest too strongly against the invasion of the birthright of Americans upon any pretence of public policy. If not checked, the worst forms of socialism will breed under the superstition, so rampant, that legislation is a sovereign cure-all for social ills. The danger now to be dreaded and guarded against is the despotism of the majority, wielding and abusing the power of legislation.<sup>2</sup>

*William D. Guthrie.*

NEW YORK, April 10, 1897.

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<sup>1</sup> Mr. Justice Brewer, in dissenting opinion, *Budd v. New York*, 143 U. S. 517, 551.

<sup>2</sup> Judge Dillon's *Yale Lectures on English and American Laws and Jurisprudence*, p. 204.



## SITUS OF CHOSSES IN ACTION.

**A**T a dinner of the Boston Bar Association, some years since, a distinguished judge in his after dinner speech said to the lawyers present that the members of the bar must bear in mind that the court in deciding cases was governed by fixed rules and principles, and was not to be too severely criticised if its decisions were not always satisfactory. A distinguished member of the bar facetiously replied that he was glad to be assured that the court was governed by fixed rules and principles, as some of the recent opinions of the court had caused him to have some doubts upon the subject.

Professor Langdell, in his address before the Harvard Law School Association in 1886, speaking of what had been necessary to place the Law School on a proper footing, said : " It was indispensable to establish at least two things ; first, that law is a science ; secondly, that all the available materials of that science are contained in printed books." To say that law is a science is another way of saying that it is based upon rules and principles which can be ascertained and stated. When these rules and principles are the result of great wisdom, deep insight into human nature, and large experience of human affairs, or, in other words, when they approach closely to the principles of divine right and justice, courts and lawyers can start with them as safe premises, from which by established processes of reasoning they can reach safe conclusions.

It is the boast of the common law that it is based on rules and principles which we can with a considerable degree of safety carry out to their logical results and apply in the decision of new cases as they arise. It is also the boast of the common law that it has in it the element of growth, i. e. of adaptability.

As human life and human society grow more complex, the simple rule of an early day is oftentimes found to be too narrow, and judicial legislation is required in order to prevent an absurd result.

If courts are to be governed by fixed rules and principles, and are to reach satisfactory results, it is clear that two things are necessary ; first, that the rules and principles be sound, and, second, that they be fully understood.

As we study the cases and read the opinions of many courts, we find not infrequently that courts have out of several rules or principles selected the wrong one for their guidance, or through ignorance have been governed by a supposed rule or principle instead of by a real one.

Of the many rules and principles of the common law none are more fundamental or wide reaching than those which relate to the *situs* of choses in action. While most of the law Latin and law French of the early common law writers has given place to modern English, no satisfactory substitute has yet been found for those odd sounding but all-meaning words *choses in action*. The following definition is taken from the "American and English Encyclopædia of Law," vol. 3, p. 235 :—

"A chose in action is a right of proceeding in a court of law to procure the payment of a sum of money. Promissory notes, bills of exchange, debts, policies of insurance, and annuities, are examples. . . . One view has restricted the term to rights of action for money arising under contracts; but while it comprehends these whatever the contract is, it is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property. It does not matter what the form of the action, legal or equitable, which is necessary to maintain the right."

It is apparent from this definition, that there is no other species of property with which courts and lawyers are called upon to deal so frequently as choses in action. Court calendars, dockets, and trial lists are chiefly composed of them. The enforcement of choses in action is, and always has been, the chief work of legal tribunals. It is manifestly important that all the rules and principles which relate to choses in action should be fully understood, as regards their origin, their scope, and their application. These rules relate not only to the *situs* or locality of choses in action, but also to the manner in which choses in action may be transferred, and how they may be legally discharged either with or without full satisfaction.

Inasmuch as the rules relating to their assignment and discharge are oftentimes made to depend upon the question of *situs* or locality, it seems desirable to consider, so far as we may in a single article, the rules and principles which especially relate to the *situs* or locality of choses in action.

The question of the locality of choses in action has presented itself in many different ways, and will undoubtedly present itself



in still other ways in the future. The question has come up most frequently, however, in the following classes of cases, viz.: (1) Cases relating to the administration of the estates of deceased persons; (2) Cases of gifts by will of personal property in a particular locality; (3) Cases of taxation; (4) Cases of foreign attachment, otherwise known as attachment by garnishee or trustee process; (5) Cases under State insolvent laws.

I shall consider each of these classes in the order named, with a view to ascertaining so far as may be what the principles are which govern in each.

#### ADMINISTRATION.

In *Graybrook v. Fox*, decided in 1561 in the Court of King's Bench,<sup>1</sup> we find it stated: "So that before the Statute of 31 Edward 3 (1357) the administrator . . . could not get in any debt nor sue any action, for his authority was confined only to the things in possession, and he could not meddle with things in action. . . . And by reason thereof the debtors of the intestate would keep the debts in their own hands, and the creditors of the intestate who ought to have them were disappointed of them."<sup>2</sup>

The appointment of administrators in England was by the Ordinary or Judge of the Ecclesiastical Court, having powers similar to those of a modern Judge of Probate. The jurisdiction of each Ordinary was confined to a particular diocese or district, and an administrator could bring suit only in the diocese where he was appointed.

An administrator could be appointed only in case there was personal property of a certain prescribed value located in the diocese. Property of the requisite value was called *bona notabilia*. After administrators were given power to sue for and collect debts and choses in action, the question must have soon arisen as to whether debts and other choses in action should be considered *bona notabilia*, and if so, where they should be considered as located for the purpose of giving jurisdiction to appoint an administrator.

In the case of *Byron v. Byron*, decided in the Court of King's Bench in 1596,<sup>3</sup> where the question was as to the proper place for the appointment of an administrator, the court say, "Every debt follows the person of the debtor." Where the debt is evidenced

<sup>1</sup> Reported in Plowd. 275, 278.

<sup>2</sup> See *Holcomb v. Phelps*, 16 Conn. 127, 134 (1844), for a fuller statement.

<sup>3</sup> 1 Croke's Reports, 472.

by a bond, "the debt is where the bond is, being upon a specialty; but debt upon a contract follows the person of the debtor, and this difference hath been oftentimes agreed."

The number of earlier cases cited shows that the question had ceased to be a new one.<sup>1</sup>

In the cases *Pipon v. Pipon*,<sup>2</sup> and *Thorne v. Watkins*,<sup>3</sup> both decided by Lord Hardwicke, Chancellor, it was held, in substance, that, while for the purposes of collection and the granting of administration debts have locality where the debtors reside, for purposes of distribution debts and other choses in action follow the law applicable to other personal property, viz. the law of the domicile of the deceased creditor. The reason given by Lord Hardwicke is, "that all debts follow the person, not of the debtor in respect of the right or property, but of the creditor to whom due."<sup>4</sup>

At a later date a statute was passed in England (55 Geo. 3, c. 184) imposing a probate duty on the property located in the jurisdiction where administration was granted. In a case which arose under this law,<sup>5</sup> the following statement or summary of the law then existing was given: "As to the locality of many descriptions of effects, household and movable goods for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property, it was established as law that judgment debts were assets for the purposes of jurisdiction where the judgment is recorded, leases where the land lies, specialty debts where the instrument happens to be, and simple contract debts where the debtor resides at the time of the testator's death. . . . In truth, with respect to simple contract debts the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be." The court held that bonds of foreign governments which were marketable in England were assets located in England, on which probate duty was payable.<sup>6</sup>

The more recent English cases have been those involving a ques-

<sup>1</sup> See *Yeoman's Widow v. Bradshaw, Carthew*, 373 (1697).

<sup>2</sup> 1 Ambler, 25 (1743).

<sup>3</sup> 2 Ves. Sen. 35 (1750).

<sup>4</sup> See 1 Saunders, 275, note (f).

<sup>5</sup> *Attorney General v. Bouwens*, 4 M. & W. 191 (1838).

<sup>6</sup> See also *Ex parte Horne*, 7 B. & C. 632 (1828); *The Queen v. Trustee of Balby, &c. Road*, 22 L. J. Q. B. 164 (1853); *Gurney v. Sowden*, 2 M. & W. 87 (1836).



tion of probate duty. Inasmuch as the test to be applied is the same as in the case of granting of administration, viz. in what place are choses in action to be deemed *bona notabilia*, we get some light from the recent decisions.

An Englishman died at Leicester, England. He was a creditor of the French government by reason of his holding a large amount of the securities known as *rentes*. It was held that the *rentes* were property located in a foreign country, and were not *bona notabilia* in England. Attorney General *v.* Dimond.<sup>1</sup> A large part of the estate of a deceased Englishman consisted of debts due from persons in North America. This part of his estate was held to be situate out of England. Attorney General *v.* Scope.<sup>2</sup>

In a very recent English case, *Baroness Julia Stern v. The Queen*,<sup>3</sup> it was held that shares of stock in certain American railroads were subject to probate duty in England. Stress was laid upon the fact that the certificates were negotiable, and would pass by delivery, and the shares were marketable in England.<sup>4</sup>

In marked contrast with the cases relating to probate duty are the cases under the English statute imposing a legacy duty. This duty is imposed upon all the personal property administered, without regard to its locality. A single case will show the rule which is followed. An English testator died possessed of considerable property in the American, Austrian, French, and Russian funds, which were transferable in those countries only. It was held to be subject to legacy duty, under the rule that personal property, wherever situate, follows the person of the owner, and is to be considered as situate at his domicile.<sup>5</sup>

In the United States the English rules relating to the *situs* of choses in action for purposes of granting administration have been followed to a considerable extent. As in England an administrator can sue only within the limits of the jurisdiction where he was appointed, so in the United States, as a general rule, an administrator can maintain an action only in the State or States in which

<sup>1</sup> 1 C. & J. 356 (1831).

<sup>2</sup> 1 C. M. & R. 530 (1834).

<sup>3</sup> 12 The Times L. R. 134 (1896).

<sup>4</sup> See also Attorney General *v.* Higgins, 2 H. & N. 339 (1857); *Fernandes' Executors Case*, L. R. 5 Ch. 314 (1870); Attorney General *v.* Pratt, L. R. 9 Ex. 140 (1874); *Laidlay v. The Lord Advocate*, 15 App. Cas. 468 (1890); Commissioners of Stamps *v.* Hope, [1891] App. Cas. 476; Attorney General *v.* Lord Sudeley, [1895] 2 Q. B. 526.

<sup>5</sup> *In re Ewin*, 1 Cr. & Jerv. 151 (1830).

he obtained letters of appointment.<sup>1</sup> The following quotations from the text writers will serve as a summary.

In Hanson's "Probate, Legacy, and Succession Duties,"<sup>2</sup> is this statement: "To prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property, it has been established at law that judgment debts are assets for the purposes of jurisdiction where the judgment is recorded; leases where the land lies; specialty debts where the instrument happens to be, — but in this respect the law has been altered, and specialty debts due from persons in the United Kingdom are now for the purposes of probate assimilated to simple contract debts by the 25 & 26 Vict. c. 22 (1862); and simple contract debts where the debtor resides at the time of the testator's death. . . . In truth, with regard to simple contract debts the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him under whose jurisdiction the debtor happened to be. . . . If an instrument is created of a chattel nature capable of being transferred by acts done here and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property."

Professor Dicey, in his recent book on "The Conflict of Laws," uses the following language: "Whilst lands and generally though not invariably goods must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced."<sup>3</sup>

<sup>1</sup> See *Wyman v. Halstead*, 109 U. S. 656 (1883); *New Eng. Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138 (1883); *Equitable Life Ass. Soc. v. Vogel*, 76 Ala. 441 (1884); *Slocum v. Sanford*, 2 Conn. 533 (1818); *Holcomb v. Phelps*, 16 Conn. 127, 134 (1844); *Strong v. White*, 19 Conn. 238, 248 (1848); *Arnold v. Arnold*, 62 Ga. 627, 637 (1879); *Cooper v. Beers*, 143 Ill. 25 (1892); *Moore v. Jordan*, 36 Kan. 271 (1887); *Pinney v. McGregory*, 102 Mass. 186 (1869); *Merrill v. New Eng. Ins. Co.*, 103 Mass. 247 (1869); *Speed v. Kelley*, 59 Miss. 47 (1881); *McCarty v. Hall*, 13 Mo. 480 (1850); *Becraft v. Lewis*, 41 Mo. Ap. 546 (1890); *Thompson v. Wilson*, 2 N. H. 291 (1820); *Chapman v. Fish*, 6 Hill, 554 (1844); *Beers v. Shannon*, 73 N. Y. 292 (1878); *Fox v. Carr*, 16 Hun, 434 (1879); *Hopper v. Hopper*, 53 Hun, 394 (1889), 125 N. Y. 400 (1891); *Matter of Romaine*, 58 Hun, 109 (1890); *Dial v. Gary*, 14 S. C. 573 (1880); *Vaughn v. Barret*, 5 Vt. 333, 337 (1833).

<sup>2</sup> 3d ed. (1876), p. 159.

<sup>3</sup> See also *Croswell on Executors and Administrators* (1889), § 64; *Story, Conflict of Laws*, 8th ed., § 362.



While there has been very little attempt on the part of the judges and text writers at analysis or philosophical reasoning as regards the *situs* of choses in action for purposes of administration, we nevertheless can gather a few fundamental principles which either consciously or unconsciously have been made the basis of the rules adopted.

Administration as regards choses in action consists, first, of the collection of the same, and, second, of their distribution. Collection may be made in either of two ways. First, by a voluntary payment to the administrator by the several debtors; second, by suit brought by the administrator against debtors. In the case of certain kinds of choses in action, viz. bonds, stocks, and negotiable paper capable of being passed by delivery, the administrator may sometimes make distribution without reducing them to money, or may reduce them to money by means of sale. The power to enforce payment of choses in action by suit is without doubt the most essential part of an administrator's equipment. Before such power was conferred by Statute 31 Edward 3 (1357) debtors omitted to pay and administrators were helpless.

It is clear that choses in action can be collected by suit only in the jurisdiction where the debtor or his property can be reached. This ordinarily has been and will be the place where the debtor resides. It may, however, be any place where legal service of process can be made upon the debtor, or a legal attachment can be made of his property.

As one writer puts it, a chose in action must be considered as situate at the place where it can be effectively dealt with. It is useless to say that a chose in action follows the person of the creditor when the matter in hand is the enforcement of payment by a suit at law.

The rules adopted at an early day by the English court were evidently all based upon the principle that choses in action are to be considered as located in the place where they can be effectively dealt with, i. e. reduced to cash. Simple contract debts were held to follow the person of the debtor, and to be *bona notabilia* in the locality where the debtor lived at the decease of the intestate. As administration usually followed close upon the decease of the intestate, and debtors generally were permanent residents, administrators appointed at the places where the debtors resided at the time of the decease of the intestate apparently found no difficulty in bringing suits in the jurisdiction where they were appointed.

In the United States, with a population less fixed and with modern conveniences of travel, cases have arisen of debtors moving their residence after the death of their creditor before the appointment of any administrator. It has been held in such cases that the essential thing is to reach the debtor, and that the power to grant administration is not confined to the courts of the place where the debtor was living at the decease of the intestate, but extends to the courts of any State where he can be found and sued.<sup>1</sup>

I have found no satisfactory explanation of the distinction made in regard to judgments and debts by specialty. It seems likely that administrators were generally able to deal effectively with these classes of choses in action, either by sale or by suit within their own jurisdiction, or the distinctions must have become obsolete. The distinction between debts by simple contract and debts by specialty has been frequently disregarded in the United States, and has been to a considerable extent, if not wholly, done away with in England by Statute 25 & 26 Vict. c. 22. Where a specialty or other chose in action is of a negotiable character, and will pass by delivery, and can be collected or reduced to money without suit by a sale in the jurisdiction where the administrator is appointed, the modern tendency is clearly to give it locality in the place where it is found.

#### WILLS.

In marked contrast with rules established in the cases of administration are the rules which have been adopted in the case of gifts by will of personal property in a designated locality.

The cases are mostly English. In *Popham v. Lady Aylesbury*<sup>2</sup> there was a gift by will of a house with all that should be in it at testator's death. It was held that cash and bank notes in the house would pass, bank notes being the same as ready money; also that bonds and other securities in the house would not pass, they not being cash, but only evidence of so much money due. In *Moore v. Moore*<sup>3</sup> there was a gift by will of "all my goods and chattels in Suffolk." These words were held not to pass a bond found in testator's house in Suffolk. Lord Thurlow, Chancellor, said: "It is contended that this sort of credit has locality, because the law has made it *bona notabilia*. But it is doubtful whether the Court

<sup>1</sup> *Saunders v. Weston*, 74 Me. 85 (1882).

<sup>2</sup> *Ambler*, 68 (1748).

<sup>3</sup> 1 Bro. Ch. Cas. 127 (1781).



Christian having thought it sufficiently local for that purpose is enough to make it local as to this.”<sup>1</sup>

In Massachusetts the law is the same.

In *Penniman v. French*,<sup>2</sup> promissory notes were held not to pass by a bequest of “indoor movables.” The court said that choses in action have no locality. They appertain, not to the house, but to the person. In *Theobald on Wills*<sup>3</sup> is the following statement: “A bequest of chattels in a house will not pass choses in action such as bonds or securities for money in the house, which are considered not property in the house, but evidence of title to property elsewhere.”

We find very little reasoning in any of the cases on this subject. A bald statement that choses in action have no locality seems to be considered sufficient. It is to be noticed that, where the locality named in the will was of sufficient extent to embrace the places of residence of the debtors who were liable upon the choses in action in question, the choses in action were held to be included in the gift. It seems probable, therefore, that the judges have had in mind the rule that debts have locality where the debtors live, rather than the rule that debts follow the person of the creditor.

The suggestion in one of the cases and in the text-book, that the choses in action are to be considered as evidence of title to property elsewhere, seems to refer to the property which the debtors are supposed to have in their hands ready to be applied in payment of their obligations.

#### TAXATION.

I shall refer to a few only of the cases, selecting those which illustrate the different rules which have been adopted relating to the *situs* of choses in action.

As a general rule, mere evidences of debt are regarded as intangible, and as having no location except in connection with their owner or his agents. In Illinois, Indiana, North Carolina, Vermont, and New York, it has been held that choses in action of a non-resident, when they are in the possession of or under the

<sup>1</sup> See also *Fleming v. Brook*, 1 Sch. & Lefr. 318 (1804); *Arnold v. Arnold*, 2 Myl. & K. 365 (1835); *Brooke v. Turner*, 7 Sim. 671 (1836); *Marquis of Hertford v. Lord Lowther*, 7 Beav. 1 (1843); *Guthrie v. Walrond*, 22 Ch. D. 573 (1883); *In re Prater*, 37 Ch. D. 481 (1888).

<sup>2</sup> 17 Pick. 404 (1835).

<sup>3</sup> 4th ed. (1895), p. 165.

management of a managing agent who resides within the State, are taxable where the agent resides.<sup>1</sup>

In the case of the State Tax on Foreign-Held Bonds,<sup>2</sup> bonds of a Pennsylvania railroad corporation were held by non-residents. After the issuing of the bonds, the State of Pennsylvania passed a law requiring the treasurer of the railroad to retain five per cent of the interest on the bonds held by non-residents, and pay over the same to the State treasurer. The bonds in question were made out of the State and payable out of the State. They were secured by a mortgage on property in Pennsylvania. It was held by a majority of the court (four judges dissenting) that the tax was invalid, as being on property not in Pennsylvania, and being in effect an impairing of the obligation of the contract made with non-residents. The case is likened to that of a discharge in insolvency, which is held invalid as against non-residents.

In *Murray v. Charleston*,<sup>3</sup> it was held (two judges dissenting) that the city of Charleston could not levy a tax on its own bonds held by non-residents, although the general law authorizing such tax was in force when the bonds were issued. The particular ordinance laying the tax was not passed until after the bonds were issued.

In *Kirtland v. Hotchkiss*,<sup>4</sup> the court held that a citizen of Connecticut might be taxed for Western mortgage bonds held by him. "That debt, although a species of intangible property, may, for purposes of taxation if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond."

In *United States v. Erie Railway Co.*,<sup>5</sup> a tax laid by the United States on bonds issued by the Erie Railway Company, owned by Englishmen, was held good, the tax being collected through the company and paid by it to the United States. Field, J. dissented. Mr. Justice Bradley concurred with the majority in a separate opinion (p. 703), in which he says: "The objection that Congress had no power to tax non-resident aliens is met by the fact that the tax is not assessed against them personally, but against the *rem*, the *credit*, the *debt* due to them. Congress has the right to tax all property within the jurisdiction of the United States, with certain exceptions not necessary to be noted. In this case the money due to non-resident bondholders was in the United States — in the

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<sup>1</sup> See 56 American Decisions, 527, note (1884).

<sup>2</sup> 15 Wall. 320 (1872).

<sup>3</sup> 96 U. S. 432 (1877).

<sup>4</sup> 100 U. S. 491 (1879).

<sup>5</sup> 106 U. S. 327 (1882).



hands of the company — before it could be transmitted to London or other place where the bondholders resided. Whilst here it was liable to taxation. Congress, by the internal revenue law by way of tax, stopped a part of the money before its transmission, viz. five per cent of it. Plausible grounds for levying such a tax might be assigned. It might be said that the creditor is protected by our laws in the enjoyment of the debt; that the whole machinery of our courts and the physical power of the government are placed at his disposal for its security and collection.”<sup>1</sup>

In matters of taxation, the first question which must be asked is, Has the body which lays the tax power to collect it? That is to say, Is the property or its owner within the jurisdiction? Having decided that there is power to collect the tax, there remains the further question whether, as a matter of propriety or policy, it ought to be exacted. Where the owner of property is within the jurisdiction, it has never been doubted that power exists to collect from him taxes on all his personal property, whether within or without the State. It has become a common thing to tax residents for their choses in action, whether in the shape of accounts, notes, bonds, or stocks, even though the debtors or parties liable upon the obligations are non-residents. The reason commonly given has been that choses in action follow the person of the owner, and have locality where he resides.

Until the case of *State Tax on Foreign-Held Bonds*,<sup>2</sup> it was generally understood that the question was one of policy, and not of power, and that, if any State saw fit to tax choses in action belonging to non-residents, they could do so when the debtors were residents of the State. The State of Pennsylvania saw fit to pass a statute laying a tax on bonds held by non-residents and issued by corporations within the State. The legality of this statute came before the Supreme Court of Pennsylvania in the case of *Maltby v. Reading, &c. R. R. Co.*,<sup>3</sup> and the court upheld the statute.

Another case under a similar statute having been decided in the same manner in Pennsylvania, it was carried to the United States

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<sup>1</sup> See *Goldgart v. The People*, 106 Ill. 25 (1883); *Dwight v. Mayor, &c. of Boston*, 12 Allen, 316 (1866); *State v. Darcy*, 16 Atl. Rep. 160 (N. J., 1888); *Worthington v. Sebastian*, 25 Ohio St. 1 (1874); *Sommers v. Boyd, Treas.*, 48 Ohio St. 648, 662 (1891); *Maltby v. Reading, &c. R. R. Co.*, 52 Pa. St. 140 (1866); *Catlin v. Hull*, 21 Vt. 152 (1849); *The State v. Gaylord*, 73 Wis. 316 (1889).

<sup>2</sup> 15 Wall. 320 (1872).

<sup>3</sup> 52 Pa. St. 140 (1866).

Supreme Court, and that court, in 1872 (four judges dissenting), decided the Pennsylvania statute was unconstitutional. This was the case above mentioned of State Tax on Foreign-Held Bonds.

The language of the majority opinion was so vigorous that it has been often quoted as decisive of the whole matter. Field, J. said: "All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

Strong as this statement is, it will hardly bear the test of careful analysis, or of comparison with the results reached by other tribunals.

It is sufficient answer to the suggestion that the State of Pennsylvania had no power to collect such a tax to call attention to the fact that the tax was already collected in the way provided, viz. by intercepting in the hands of the debtor within the State a portion of the interest money about to be sent to the non-resident bondholders. There can be no objection to the method employed. It is generally conceded that the best way of collecting a tax is by requiring the person who is to distribute any fund to take out the tax, and pay it over to the government. It is a common provision in the various collateral inheritance tax laws that the executor or administrator shall deduct and pay the amount of the tax before making distribution either to residents or non-residents. Judged by the rule that protection and taxation are reciprocal, there is surely no impropriety in a tax such as was laid by the State of Pennsylvania.<sup>1</sup>

It is evident that in any reasoning upon the question of the *situs* of choses in action we must start with the self-evident truth that, being incorporeal, they can have no actual *situs*. When we ascribe locality to them we do so in a figurative way, because it is impossible to deal with them without so doing. The fiction which gives them a *situs* where the debtor resides is certainly not an absurd one. In the usual case of a debtor and creditor, the debtor

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<sup>1</sup> See Cooley on Taxation, 2d ed. (1886), p. 19.



has the tangible property which is to satisfy the debt, and the creditor has a hope more or less well grounded of receiving it. If the debtor lives in a State where laws are well enforced, the creditor by going there may reduce his hope to a certainty. If the debtor lives in a State where property is well protected, the creditor's expectation of getting his claim satisfied is the less likely to meet with disappointment.

Apart from its reasoning on the subject above cited, the basis of the decision of the United States Supreme Court in the case on Foreign-Held Bonds was the point that the statute was one which impaired the obligation of contracts made by the railroad with the non-resident bondholders. The authority for this position was found in the case of *Baldwin v. Hale*,<sup>1</sup> which decided that a discharge in insolvency, granted by a State court, was invalid as against non-resident creditors. In an article in this magazine, entitled "Discharge in Insolvency and its Effect on Non-residents,"<sup>2</sup> I ventured to question the soundness of *Baldwin v. Hale*. I desire to call attention to State Tax on Foreign-Held Bonds, and invite a similar inquiry.

If the tax is valid as against resident bondholders, why is it not valid against non-resident bondholders?

The United States Supreme Court can have nothing to say in regard to the propriety of such a tax. It is a question purely of the power of a State legally to collect it. That a State is able to collect such a tax, as well in the case of non-residents as in the case of residents, there can be no question.

The debtor is within the State, and the legislature and courts of the State have power over him to compel payment of the tax, and power to protect him against any claim his creditors may make by reason of such payment. If the non-resident creditor has property in the shape of a chose in action which is of any value, it is because he can rely on the legislature and courts of the State where his debtor resides to aid him in collecting his claim. In the case of State Tax on Foreign-Held Bonds, the statute which was held to impair the obligation of the contract was passed after the bonds were issued. In 1877, in the case of *Murray v. Charleston*,<sup>3</sup> the court applied the same rule, although the statute authorizing such taxation was in force when the bonds were issued.

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<sup>1</sup> 1 Wall. 223.

<sup>2</sup> 6 HARVARD LAW REVIEW, 349.

<sup>3</sup> 96 U. S. 432.

The city ordinance laying the tax was, to be sure, passed after the bonds were issued. Two judges dissented, on the ground that the law allowing such taxation, being in force before the contract was made, entered into it and became a part of it, and hence there was no impairment of the contract.

It is to be noticed that in *Baldwin v. Hale* the statute authorizing insolvency proceedings was enacted prior to the date of the contract which was held to be impaired.

In 1882 the United States Supreme Court, in the case above mentioned, of *United States v. Erie Railway Company*,<sup>1</sup> as it would seem, repudiated the reasoning which was the basis of the decision in *State Tax on Foreign-Held Bonds*. A tax laid by the United States on foreign-held bonds was held to be valid because the debt due to the foreigner was property within the jurisdiction of the United States. The court say, "The tax is not assessed against them [the foreigners] personally, but against the *rem*, the *credit*, the *debt* due to them." Mr. Justice Field, who wrote the opinion in *State Tax on Foreign-Held Bonds*, dissented. How much remains of the decision in that case seems to be a matter of some uncertainty. It is to be noticed, of course, that there is no constitutional provision forbidding the United States to pass laws impairing the obligation of contracts, so that the decision of *United States v. Erie Railway Company* does not overrule the previous decision.

#### TRUSTEE PROCESS.

The question of the *situs* of choses in action is directly involved in the cases of foreign attachment, or garnishee or trustee process, as they are commonly called. Attachment by trustee process is of very early origin, being derived, as it is said, from an early custom in London and Exeter. It is authorized by statutes in most, if not all, of the States. As the name foreign attachment indicates, it was permitted in early days only in the case of absent defendants, i. e. defendants who were out of the jurisdiction, or by reason of concealment were beyond the reach of process. This was the case in Massachusetts and Rhode Island until statutes were passed extending the law to resident as well as absent defendants. Goods as well as credits may be reached by trustee process. I shall confine my attention, however, to cases of attachment of credits or

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<sup>1</sup> 106 U. S. 327.



choses in action belonging to absent defendants. It will be noticed that it is a fundamental feature of the proceeding in every case that a resident debtor is held to have discharged his debt by paying it, not to the creditor to whom it is due, but to some one else found by the court to have a valid claim against that creditor. We shall find that this discharge is without any legal service of process upon the creditor, and often without his knowledge. The whole framework of the structure, if we may so call it, rests upon the fiction that debts follow the person of the debtor, and have locality where the debtor resides, or where he can be legally served with process.

For a long time it was the rule in Massachusetts that a person could be held as trustee only in the State where he resided, and that he could not be held as trustee in any State where he might be temporarily found. The basis of the rule was the idea that the chose in action sought to be attached had its *situs* for purposes of attachment only at the residence of the debtor, and did not follow him away from that place.<sup>1</sup>

The same rule was applied to foreign corporations doing business in Massachusetts and it was held that they could not be there summoned as trustees.<sup>2</sup>

In 1870 the law in Massachusetts was changed by statute, and non-residents and foreign corporations having a usual place of business in the State were made liable to trustee process.

In the case of *National Bank of Commerce v. Huntington*,<sup>3</sup> the Massachusetts court not only decided that, under the Act of 1870, c. 194, a non-resident corporation having a usual place of business in Massachusetts was liable to trustee process, but also took occasion to say that there was no reason why a corporation should not be liable to trustee process in any State where it could be sued, that is to say, where it could be legally served with process.

Following this decision, it has been held in many other States that a corporation may be summoned as trustee in any State where it is doing business, and can be legally served with process not only where the principal defendant is a resident of the State, but also where he is a non-resident and served by publication only.<sup>4</sup>

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<sup>1</sup> *Tingley v. Bateman*, 10 Mass. 343 (1813); *Nye v. Liscombe*, 21 Pick. 263 (1838).

<sup>2</sup> *Gold v. Housatonic Ry. Co.*, 1 Gray, 424 (1854); *Larkin v. Wilson*, 106 Mass. 120 (1870).

<sup>3</sup> 129 Mass. 444 (1880).

<sup>4</sup> *Selma, Rome, & Dalton Ry. Co. v. Tison*, 48 Ga. 351 (1873); *Lancashire Ins.*

Opposed to these decisions we find a series of cases in different States based on the doctrine that, while a debt or chose in action usually has its *situs* at the residence of the creditor, it may for purposes of attachment be given a *situs* at the residence of the debtor, but in no event can it follow the debtor away from his residence; and in the case of corporations it cannot follow them away from the State where they were organized.<sup>1</sup>

The courts in many States follow the early Massachusetts rule that an individual cannot be summoned as trustee where he is transiently found.<sup>2</sup> But the better rule would seem to be that, wherever the creditor can maintain a suit to recover his debt, there it may be attached as his property provided the laws of such place authorize it. As one of the judges puts it, the plaintiff in a trustee suit is subrogated to all the rights which the principal defendant has against the trustee. He stands in the shoes of the principal defendant.<sup>3</sup>

The fact that the debt due from the trustee is payable out of the State does not prevent its being reached.<sup>4</sup>

In a recent case in Wisconsin a justification for the attachment by trustee process of a debt due to a non-resident was found by referring to the law applicable in cases of administration of estates of deceased persons.<sup>5</sup>

Co. v. Corbett, 62 Ill. Ap. 236 (1895); Hannibal & St. Joseph Ry. Co. v. Crane, 102 Ill. 249 (1882); Wabash Ry. Co. v. Dougan, 142 Ill. 248 (1892); B. & M. Ry. Co. v. Thompson, 31 Kan. 180 (1884); Cousens v. Lovejoy, 81 Me. 467 (1889); National Bank v. Burch, 80 Mich. 242 (1890); Harvey v. Great Northern Ry. Co., 50 Minn. 405 (1892); McAllister v. Penn. Ins. Co., 28 Mo. 214 (1859); National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468 (1895); Railroad v. Peoples, 31 Ohio St. 537 (1877); Barr v. King, 96 Pa. St. 485 (1880); Moshassuck Felt Mill v. Blanding, 17 R. I. 297 (1891); Neufelder v. North British, &c. Ins. Co., 10 Wash. 393 (1894); Mooney v. Buford, &c. Co., 72 Fed. Rep. 32 (1896).

<sup>1</sup> Louisville & Nashville Ry. Co. v. Dooley, 78 Ala. 524 (1885); Ala. Great Southern Ry. Co. v. Chumley, 92 Ala. 317 (1890); McBee v. Purcell Nat. Bank, 37 S. W. Rep. 55 (1896, Ind. Ter.); Mo. Pac. Ry. Co. v. Sharitt, 43 Kan. 375 (1890); Douglass v. Ins. Co., 138 N. Y. 209 (1893); Blanc v. Tennessee, &c. Co., 37 N. Y. Supp. 906 (1896); Wood v. Furtrick, 40 N. Y. Supp. 687 (1896); Craig v. Gunn, 67 Vt. 92 (1894); Reimers v. Seatco Mfg. Co., 70 Fed. Rep. 573 (1895).

<sup>2</sup> Green v. Farmers' & Citizens' Bank, 25 Conn. 452 (1857); Cronin v. Foster, 13 R. I. 196 (1881); Baxter v. Vincent, 6 Vt. 614 (1834); Shinn on Attachment and Garnishment (1896), Vol. 2, sec. 490.

<sup>3</sup> Hardware & Mfg. Co. v. Lang, 127 Mo. 242 (1894); Howland v. Ry. Co., 36 S. W. Rep. 29 (1896, Mo.); Morgan v. Neville, 74 Pa. St. 52 (1873); Neufelder v. German American Ins. Co., 6 Wash. 336 (1893).

<sup>4</sup> Pomeroy v. Rand, McNally & Co., 157 Ill. 176 (1895).

<sup>5</sup> Bragg v. Gaynor, 85 Wis. 468 (1893).

In another recent case of trustee process in a United States Circuit Court of Appeals, an Administration decision was cited on the doctrine of *situs*.<sup>1</sup>

Shares of stock in a corporation belonging to a non-resident, if liable to trustee process at all, can be reached only in the State where the corporation was organized. They cannot be reached in any other State even though the corporation is doing business there and has an agent upon whom process can be served.<sup>2</sup>

The reason given is that shares for purposes of attachment have no *situs* except at the place of domicile of the corporation.

In a few cases the doctrine that a chose in action has its *situs* at the residence of the creditor and follows the creditor has been held fully applicable to cases of trustee process, and to prevent any valid attachment of debts due to a non-resident, except in cases of personal service on the principal defendant or of his voluntary appearance.<sup>3</sup>

We have cited only a few cases and authorities.

It is apparent that there has been a wide divergence of opinion on almost every point which has come up, and especially upon the point whether a debtor can be summoned as garnishee outside of the State of his residence. The tendency of legislation and of the decisions seems clearly to be that debts follow the person of the debtor, and that a person may be summoned as garnishee in any State where he can be legally served with process. In Massachusetts by statute a debtor may be summoned as trustee either where he lives or where he has a usual place of business; and in Massachusetts and many other States foreign corporations doing business in the State, and having a usual place of business or an agent upon whom service may be made, may be summoned as trustees or garnishees.

This is in effect saying that a debt may have more than one *situs* for purposes of foreign attachment.

It is another illustration of the rule that a debt may properly be treated as having locality in any place where it can be effectively dealt with, i. e. where it can be collected. If a man has a usual place of business in several States, and can be found in each and

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<sup>1</sup> *Mooney v. Buford, & Co.*, 72 Fed. Rep. 32, 40 (1896).

<sup>2</sup> *Plimpton v. Bigelow*, 93 N. Y. 592 (1883); *Ireland v. Globe Milling & Reduction Co.*, 32 Atl. Rep. 921 (1895, R. I.).

<sup>3</sup> *Central Trust Co. v. Chattanooga R. & C. Ry. Co.*, 68 Fed. Rep. 685 (1895); *Reno on Non-Residents*, Preface, p. vi.



served with process, it seems clear that there is no practical difficulty in the way of making him liable to trustee process in each State. The same is true of corporations doing business in several States.

In the case of *Cross v. Brown* in Rhode Island,<sup>1</sup> a strong argument was made by the claimant that it was unconstitutional for the court to undertake to discharge a trustee or garnishee from his obligation to a non-resident who was served by publication only.

The argument was briefly this. The United States Supreme Court have decided that State insolvent laws are unconstitutional in so far as they authorize the discharge of a debtor from his obligations to non-resident creditors who are served only by publication or notice out of the State.<sup>2</sup> The United States Supreme Court have also decided that State laws are unconstitutional which provide that resident debtors shall pay to the State in the shape of a tax a part of their debts, instead of paying them in full to the non-resident creditors.<sup>3</sup> Why does it not follow that State laws are unconstitutional which compel a resident debtor to pay the whole of his debt, not to his non-resident creditor, but to some third party, and which hold that such payment works a valid discharge of the debt, even though the non-resident creditor was served only by publication, and possibly never heard of the proceeding?

There is certainly much force in the argument. Similar reasoning was deemed conclusive by Judge Campbell, who wrote the dissenting opinion in the case of *Moore v. Wayne* Circuit Judge.<sup>4</sup> The chief ground of reply to this argument by the Rhode Island court was, that if it were adopted it would overturn the whole law of foreign attachment which had been in force for more than a century. This is another way of saying that the whole law of foreign attachment is against the cases of *Baldwin v. Hale*, and *State Tax on Foreign-Held Bonds*.

The true way to reach consistency, as it would seem, is to abandon *Baldwin v. Hale*, and *State Tax on Foreign-Held Bonds*.

#### STATE INSOLVENT LAWS.

The question of the *situs* of choses in action arises in insolvency proceedings both in connection with the point as to what law shall

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<sup>1</sup> 33 Atl. Rep. 147 (1895).

<sup>2</sup> *Baldwin v. Hale*, 1 Wall. 223.

<sup>3</sup> *State Tax on Foreign-Held Bonds*, 15 Wall. 320.

<sup>4</sup> 55 Mich. 84 (1884).

govern as to the debtor's discharge, and in connection with the point as to what law shall govern in determining what choses in action pass by the assignment.

The law on the latter point was considered by me in an article in this magazine, entitled "An Assignment in Insolvency and its Effect upon Property and Persons out of the State."<sup>1</sup>

The law on the first point was considered by me in the article previously mentioned, "A Discharge in Insolvency and its Effect on Non-Residents."<sup>2</sup> In this article,<sup>3</sup> I suggested that the relation of debtor and creditor was in a certain way one that entered into and formed a part of the status of the debtor and of the creditor, and that any court having a right or having the power to deal with the status of either could deal with this relation.

It may be further noticed that the relation of a debtor toward his creditor is in many ways similar to that of a trustee to his *cestui que trust*. The debtor, to be sure, does not hold any particular property for the benefit of the creditor. He holds all his property for the benefit of all his creditors, to the extent of their claims, and if he fails to recognize his obligations, and refuses to apply his property in satisfaction of his debts, the courts of law seize upon and apply it much in the same way that courts of equity take possession of trust property and make distribution of it.

In conclusion, one thing seems clear, viz. that the law relating to the *situs* of choses in action is in a state of confusion.

How can it be simplified? Mr. Justice Oliver Wendell Holmes, in his address at the last dinner of the Harvard Law School Association, June 25, 1895, said: "An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. . . . The Italians have begun to work upon the notion that the foundations of the law ought to be scientific, and if our civilization does not collapse I feel pretty sure that the regiment or division that follows us will carry that flag."

The law relating to the *situs* of choses in action, taken as a whole, is certainly not scientific. How shall we make it so?

Hollis R. Bailey.

<sup>1</sup> 7 HARVARD LAW REVIEW, 281.

<sup>2</sup> 6 HARVARD LAW REVIEW, 349.

<sup>3</sup> Page 359.

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NEW REGULATIONS AS TO CANDIDATES FOR A DEGREE. — The Faculty of the School has recently passed three important votes, the effect of which, it would seem, will be to raise still higher the standard of the School, and to add to the significance of a degree obtained here.

First: "Hereafter no applicant will be admitted as a first year or special student unless he registers between Commencement Day and the first day of December following."

Second: "To students entering hereafter, as candidates for a degree, the privilege of spending the second or third year away from the School will be granted only in rare instances, and upon cogent reasons being presented to the Faculty."

Third: "After June, 1898, third year students who are candidates for the ordinary degree, as well as those who are candidates for the honor degree, will be required to take ten hours work a week, instead of eight hours, as at present."

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THE UNIVERSITY OF CINCINNATI LAW SCHOOL. — That portion of the Annual Report of the University of Cincinnati for the year 1896 which gives an account of the foundation of a law department there, should call forth hearty wishes for the success of the new School from all graduates and members of the Harvard Law School. It must be a source of gratification to the members of the Harvard Faculty that the ideas for which they have worked earnestly and consistently should be adopted by the very able body of men comprising the Faculty of the University of Cincinnati Law School; it is a tribute to the efficiency and an indication of the permanence of the methods of legal education instituted here. Starting on the right basis, and under thoroughly competent guidance, the new Law School is certain to succeed. The REVIEW takes pleasure in printing the following selection from the Report of its Dean, Judge Taft: —

"In the conduct of the Law School, the Faculty decided that its wisest course would be to follow as closely as circumstances would permit the



course and methods of study prevailing at the Harvard Law School. The Harvard Law School is undoubtedly the most thorough and satisfactory School for the study of Anglo-American law in the world, and we could set before us no higher standard. It was resolved to admit no applicant to our School who was not a graduate of a high school or an academy of equivalent standing, or who could not pass an examination showing proficiency in those branches of a high-school education important as a basis for the study of law. No one is now admitted to the Harvard Law School who is not the graduate of a college, but we did not deem it wise in a new school to make the requirements for admission quite so high. . . . In the study of contracts, torts, and property, the instructors have adopted the case system as it is pursued at Harvard, and the same books of select cases are used by the students. The system has worked well. It has aroused an interest on the part of the students in the study of these subjects that would be wanting under the old text-book system. . . . In addition to the lectures and recitations, the students have organized several law clubs and a general debating club, in each of which it is the custom to consider and discuss cases suggested either by one of the faculty, or by recent graduates of the Harvard Law School practising law in the city, who, interested in the School and its subject, are able to render material assistance to the students. Such discussions are presided over by the person suggesting the case or question, and at the conclusion a decision is rendered. Briefs are expected from those appointed to lead in the discussion. The attention of the students is thus kept alive to the course of study, and original investigation and reasoning on lines of approved legal thought are stimulated. . . . For the first year's work we follow the Harvard curriculum exactly: students for a degree are required to devote ten hours a week to law lectures and recitations from the first week in October until the first week of the following June."

Judge Taft then gives a list of courses for the second year's study, and proceeds: "At Harvard the candidate for an honor degree has the choice of selecting ten hours of study per week from a course which embraces altogether eighteen hours of recitation per week. It is not possible for us to give so wide a choice, because our force of teachers is inadequate. The above course was selected from the longer one at Harvard, after a full consultation by correspondence with members of the Harvard Law Faculty. It may not be improper for us at this point publicly to acknowledge the very great assistance we have derived in the organization of our School from the suggestions of the members of that Faculty, and to tender our thanks for the same."

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**MALICIOUS ABUSE OF A LEGAL PROCESS.** — It is somewhat surprising that a case recently decided in the New York Supreme Court, *Dishaw v. Wadleigh*, 44 N. Y. Supp. 207, should be the first in which the courts of that State have had occasion to recognize malicious abuse of a legal process as a cause of action. This variety of tort, though of modern origin, is now well known in many jurisdictions. The case in New York is a good example of its kind. The defendant, an attorney, having obtained an assignment of a debt owed by the plaintiff, and brought an action on it, sued out a subpoena against him, alleging that his testimony was material in the case. On the debtor's failing to appear, the attorney

procured an attachment against him, by virtue of which he was arrested, brought into court, and made to pay a fine and costs. It then appeared that the debtor was not wanted as a witness; and it was afterwards shown that the attorney sued out the subpoena only in the hope that he would be induced to pay the debt immediately, rather than take the trouble of appearing at the trial which was held at a considerable distance from his home. The justice of allowing the debtor to recover the damage which he has suffered is evident; and the case well illustrates the principal point to be noticed with regard to this sort of tort. The creditor had a perfectly good cause of action in the first place, on which he had a right to sue, and had, in fact, obtained judgment before the bringing of this second suit. The justice or good faith of his claim, however, does not excuse his use of a legal process for a purpose for which it was not intended. In the ordinary action for malicious prosecution of a criminal charge, or the less well established action for maliciously bringing a civil suit, (see 9 HARVARD LAW REVIEW, 538,) it is always necessary to prove that the first suit has been decided against the plaintiff in that suit before the second suit can be brought. Where the action is for abuse of a legal process, however, it is immaterial what has become of the original action. In most of the cases in the books, it will be observed that the question is not even whether the defendant improperly caused the process to issue, but whether he improperly used it for some purpose outside of its legal scope, as to extort money. *Wood v. Graves*, 144 Mass. 165. In this particular case, while the suit was an honest one, it was an abuse to sue out the subpoena at all. The money which was hoped to be procured was here lawfully due; but that is no more an excuse for the abuse of the subpoena than it would be for threats of physical violence.

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EX POST FACTO LAWS AND THE POLICE POWER. — A New York statute provides that no person shall practise medicine in the State who has ever been convicted of a felony. The Court of Appeals, in *People v. Hawker*, 46 N. E. Rep. 607, has recently held that the statute applies to persons convicted before its passage, and that as to such of them at least as were not engaged in the practice of medicine at the time of its passage, it is not invalid as an *ex post facto* law. The court holds that the statute does not prescribe an additional penalty for a past offence, but is an eminently justifiable exercise of the police power in the interests of the public health. The decision is interesting in the light of the well known Test Oath cases, *Cummings v. State of Missouri*, 4 Wall. 277, and *Ex parte Garland*, ib. 333, decided by the Supreme Court in 1866. In the former, the question was as to the constitutionality of a provision in the Missouri Constitution of 1865, to the effect that all persons who had ever given assistance to the enemies of the Union should be disqualified as voters and forbidden to hold office or engage in certain professions. The court held that this provision was void as an *ex post facto* law. In *Ex parte Garland*, a similar Act of Congress was declared unconstitutional. In both cases the question was raised by a person who was in the actual practice as one of the proscribed professions when the law was passed, and who had been forced to abandon it. By way of *dicta*, however, the court sweepingly condemns the laws in question as applied to all persons. Four judges dissented in each case, on the ground taken by the Court of Appeals in *People v. Hawker*, *supra*, that the laws merely



prescribed legitimate qualifications for those who wished to practise certain professions, and did not impose a new penalty for a past crime. There is good ground for contending that the dissenters in those cases took the correct view. And in the New York case, where the qualification required was much more intimately connected with fitness for the profession, there can be small doubt but that a correct result was reached.

It may perhaps be questioned whether the laws involved in any of these cases are any more open to the objection of being *ex post facto* when applied to a person at the time practising one of the forbidden professions, than they are when applied to one not yet in practice. Though this distinction is taken by Pomeroy (Constitutional Law, §§ 530-533), who supports the actual decisions in the Test Oath cases, while disagreeing with much that was said by Mr. Justice Field in the course of his opinion. The whole question would seem to be whether the law is in substance the infliction of an additional punishment for a past offence, or a *bona fide* regulation of a calling in which the public has a deep interest. If the latter, it seems clear from *Dent v. West Virginia*, 129 U. S. 114, that it is valid as to existing practitioners, as well as other persons.

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THE RIGHT TO COMPEL TESTIMONY IN LEGISLATIVE INVESTIGATIONS. — The power of a legislative body to punish for contempt is so clearly a judicial power, that any considerable exercise of it naturally arouses a suspicion in the popular mind that some usurpation of judicial functions is being attempted. The courts, also, while recognizing the necessity for the existence of such a power, claim the right to restrain the use of it. Even an order of the House of Commons is subject to review in the courts, since the famous case of *Stockdale v. Hansard*, 9 A. & E. 1. In this country, where National and State Constitutions strictly separate the judicial from the legislative department, and for the most part expressly define the powers of each branch of the government, the limitations of the power of a legislative body to punish for contempt are more evident.

The question as to which the greatest difficulty is likely to arise in these times concerns the extent to which legislatures may compel witnesses to testify before investigating committees. This is the point raised in the recently decided case, *In re Chapman, Petitioner*, in which, as appears from the advance sheets of the opinion, the Supreme Court of the United States finally refuses to interfere with a sentence condemning the petitioner to imprisonment for violation of a statute providing for the punishment of persons refusing to testify before either House of Congress, or any committee of either House. The facts of this case are generally known; the prisoner's offence, in brief, consisted in refusing to answer certain questions put to him by a committee of the Senate, appointed to investigate charges of serious misconduct on the part of members of that House. The court holds that the Senate had the right to conduct such an investigation, under its express constitutional power to try and expel its own members for misconduct, and that the questions asked were relevant to the subject of the investigation. The reasoning of the court is so clear and simple, that it is difficult to see why any one could have honestly felt any doubt on the matter. The argument for the petitioner went principally on the ground that he had a right to refuse to disclose his private business affairs. But if the investigation was a proper pro-



ceeding, and the question relevant to the matter in hand, it does not appear why a witness should be allowed any more extensive privileges than if he were in a court of law.

In what classes of investigation a legislative body has the power to compel testimony is a difficult question. It must be confined to investigation conducted for the purpose of aiding a branch of the legislature in the performance of its constitutional functions. *Kilbourn v. Thompson*, 103 U. S. 168. In the present case, however, it is reasonably apparent that the investigation was undertaken to enable the Senate to take measures for the censure or expulsion of certain of its members, if it should see fit to do so, under its express constitutional power. Whether an inquiry for the purpose of obtaining information to assist the legislators in framing laws would be considered by the courts as equally within the constitutional powers of the Houses of Congress has never been decided. In New York, however, such investigations by a branch of the legislature have been upheld. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463.

In the case of *In re Chapman*, the obstinate witness, it will be observed, was not punished directly by the Senate for contempt, but convicted by the courts under a general statute providing for the punishment of such offences as misdemeanors. If the Houses have the power to compel persons to give testimony, it does not appear how there can be any objection to the constitutionality of a statute enacted to aid them in the exercise of that power; and the only reasonable construction of such a statute is that it was intended to apply solely to those who refuse to answer questions properly asked of them in the course of a lawful proceeding. The possibility that one of the Houses might institute such an investigation for unjustifiable purposes is no reason why they should not be given every aid towards the efficient prosecution of their investigations, so long as the propriety of such proceedings in any instance is subject to the judgment of the courts.

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PROSPECTIVE DAMAGES. — In a recent case in Ohio, *Wolf v. Cincinnati Edison Electric Co.*, Ohio Legal News, March 27, 1897, the trial court allowed prospective damages for the depreciation in value of the plaintiff's land, due to a nuisance arising from the operation of an electric plant belonging to the defendant. Upon reviewing the case, the Court of Common Pleas refused to allow these damages, owing to a defect in the pleadings; but the court agreed to admit them if the plaintiff would amend his pleadings by treating the nuisance as if it were permanent, and would agree to waive his claim to damages in future actions upon the continuance of the nuisance.

The general rule in this class of cases, where the injury comes not from a single act but from the continuance of certain acts, is that prospective damages are allowed only when the nuisance is by its nature permanent. They cannot be recovered if the cause of the injury may be abated. It is only when harm is done by a strictly permanent structure that the damage can be looked upon as coexistent with the structure which causes it. In the present case the court extends this doctrine: if the plaintiff elects to treat a nuisance which is likely to continue in the future as permanent, he can recover prospective damages. Undoubtedly reliance is placed upon the analogy of certain railroad cases, where it is held that a railroad causing injury by a

structure, which, though not necessarily permanent, is built under authority of law, is liable for future damages, if the injured party so pleads his case. *Railroad Co. v. Anareus*, 26 Kan. 702. In these cases the operation of the structure is lawful, and cannot be stopped by injunction. Even though not permanent, it is potentially permanent. It will always be lawful; the law therefore permits the injured party to assume that it will always continue. This principle, however, has no application when the operation of the structure is neither permanent nor lawful, as in the case under consideration. *Harmon v. Railroad*, 87 Tenn. 614; Sedgwick on Damages, 8th ed., vol. 1, § 95. Nothing appears from the reported case to show that the electric plant was operated by any authority of law. Its operation was illegal, and could be abated; and to say that the plaintiff may at his election recover prospective damages is equivalent to saying that the plaintiff has the right to deprive the defendant of his liberty to repent his wrongdoing, and restore the former condition of affairs, after repairing the damages he has actually inflicted. If, after paying damages for a permanent wrong, the defendant were to stop his factory and abate the nuisance, he would be in the anomalous position of having been punished for wrongful acts which he never had committed and which he never would commit. This conclusion cannot be supported.

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CONTRACT VOID ON GROUNDS OF PUBLIC POLICY. — When an attorney enters into a contract, a part of the consideration of which involves an endeavor to prevent the finding of an indictment against his client, the contract is void from considerations of public policy. Its invalidity does not depend upon the question whether the attorney acted in bad faith, or whether he did any acts under the contract contrary to law. This is the decision of the Supreme Court of Ohio in the case of *Weber v. Shay and Cogan*, 56 Ohio, 51. This result is reached by an application of the principle that contracts repugnant to the general policy of the common law will not be enforced. In applying this doctrine the courts are forced to meet two opposing tendencies in the development of the law. On the one hand is the fundamental principle that contracts in general, when they satisfy formal requirements, are by their nature enforceable; and that it is arrogance on the part of the courts to consider them in their illegal aspect from the point of view of policy. In opposition to this has grown up another more modern tendency of the law to look upon certain classes of contracts as immoral, and to impose upon the courts the responsibility of refusing to enforce them.

No one can doubt the propriety of the courts' refusing to enforce contracts to do an illegal act. In this the courts do not take it upon themselves to decide what is illegal; that is decided for them by statute and by the common law, which they merely interpret. The next step is more dangerous; some agreements are held void where the express acts promised are not strictly illegal, but only against public policy. In this matter the courts must create the law. Thus contracts to stifle criminal prosecutions are not enforced; nor contracts to pay money for immoral intercourse, to use unprincipled personal influence in order to pervert legislation, or to abstain from giving evidence in a pending suit. In all of these cases it is clear that the acts, though not illegal, prevent the even working of public affairs; public opinion undoubtedly condemns them; and the courts are not likely to be criticised for interfering.



A third class of cases is that in which the acts contracted for may not themselves be illegal, or even against public policy, but in which the contracts are from their very nature of an improper tendency; these contracts the courts refuse to enforce, wholly without consideration of the effect of specific acts done under them. The end, not the means, is condemned; the moral effect of the contract as a whole is bad. Into this class the case under consideration falls. Here the courts are cautious in asserting themselves; they can be justified in so doing only where the danger affects their own mechanism or the mechanism of the government upon which their existence depends, or the relations of the society upon which the government rests. An agreement in restraint of trade is invalid; it affects the integrity of society, not because it is necessarily against public policy for a certain man to refrain for the rest of his life from taking part in a particular business, but because it is against public policy for him to bind himself to do so. A promise to use influence in order to obtain a government contract is void in itself, even though the influence is used in a legitimate way; this concerns the efficiency of the general government. *Tool Co. v. Norris*, 2 Wallace, 45. An agreement to "use every legal and proper endeavor" to have criminal prosecutions dismissed is void; this affects the integrity of the courts themselves. *Overbeck v. Hall*, 14 Bush (Ky.), 505. The same principle applies to the present case. The contract for services of attorney which involve an effort to prevent the finding of an indictment is void in itself, whether any wrongful act is intended under it or not. It is bad in the essence of its subject matter; by its nature it has a tendency to affect the secret workings of the grand jury; and the court is right in refusing to enforce it.

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"THE THREE FRIENDS"—VIOLATION OF THE NEUTRALITY LAWS.—The legality of the much discussed seizure of the ship "The Three Friends," under the forfeiture clause of Section 5233 of the Revised Statutes, commonly known as the Neutrality Laws, as that vessel was about to start to the aid of the Cuban insurgents, has now been affirmed by the Supreme Court. *The Three Friends*, 17 Sup. Ct. Rep. 494. A novel question as to the construction of the statute, upon which depends the propriety of the government's seizing vessels intended to assist these insurgents, or any similar body of people, is effectually dealt with by the Chief Justice in a long opinion, from which, however, Mr. Justice Harlan dissents. The terms of the statute direct the forfeiture of any vessel fitted out "with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace." While it is admitted that the objects of hostility, under this act, must be some people officially recognized by the Executive as belligerents, a question arises as to whether it is necessary that the body of persons in whose service the vessel is to be employed shall have received a similar recognition. Looking at the general purpose of the law, it is evident that its object is to prevent persons within our jurisdiction from aiding hostilities against some state or people whom we have at least recognized as belligerent. To no other body of persons could our government possibly lie under any international obligation to discountenance



such attempts. Supposing, however, that the object of hostilities is at least a people recognized as belligerent, which might, according to the principles of international law, bring claims against our government for allowing such acts in aid of hostilities against them, it seems immaterial whether the persons committing such hostilities are recognized by us as belligerent or not. Though perhaps the word "neutrality" describes exactly only the position we ought to take towards two recognized belligerent parties, yet surely we are also under an obligation not to permit aid to be given by persons within our jurisdiction to any attack upon a people with whom we are at peace, whether we have or have not as yet recognized the attacking party as belligerents. To enforce all such obligations is the apparent object of the statute; and the words "any colony, district, or people" seem sufficiently broad to cover all cases. The difficulty arises principally from the fact that exactly the same terms are used immediately before in designating the objects of hostility. The court below, and Mr. Justice Harlan, consider it impossible to restrict the meaning of the words in one place and not in the other. The majority of the Supreme Court, however, see no objection to construing the words differently in the different connections, and upon thorough consideration of the scope of the act reach a conclusion which ought decidedly to recommend itself to all, so long as we remain at peace with the Spanish nation.

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THE LIABILITY OF AN INSANE ACCOMMODATION INDORSER. — In a late Tennessee case, *Memphis National Bank v. Sneed*, 36 S. W. Rep. 716, the defendant's testator, while of sound mind, signed a note as accommodation indorser, and later, after becoming insane, signed in like capacity a renewal of the original obligation, the old note being at the same time surrendered and extinguished. The estate of the insane person was held liable in an action on the new note, the decision being rested upon the ground that the plaintiff had no notice of the insanity, and that the lunatic had received a valuable consideration in his release from liability upon the old note. A similar case is *Snyder v. Laubach*, 7 W. N. 464. See also, *Wirebach's Executor v. First National Bank*, 97 Pa. St. 543; *Hostler v. Beard*, 43 N. E. Rep. 1040 (Ohio).

If it be conceded that the holder ought under any circumstances to be allowed to recover upon the instrument itself against a defendant who was insane at the time of signing, it certainly seems fair to permit such recovery where the defendant has received a *quid pro quo*. It is submitted, however, that in all cases where negotiable paper has been signed by a defendant who was *non compos mentis*, the law should allow no action whatever upon the instrument. Insanity, like infancy, coverture, and extreme intoxication, is properly a real defence based upon the incapacity of the defendant to make a binding contract. *Sentance v. Poole*, 3 C. & P. 1; *Van Patton v. Beals*, 46 Iowa, 62. But where the insane person has received a *quid pro quo*, it is manifestly unjust that he or his estate should be thus enriched at the expense of an innocent party, and the courts should unquestionably furnish some adequate remedy. The court in *Memphis National Bank v. Sneed* rightly regarded the insane indorser's release from liability on the old and valid note as a valuable consideration, but unfortunately it proceeded upon the supposition, that unless recovery were allowed upon the new note, the plain-

tiff would be without relief. Apparently this supposition was not well founded. It is conceived that equity would have allowed a recovery upon the old note on the ground of failure of consideration; and even if this instrument itself had been physically destroyed, equity would still have permitted the plaintiff to charge the lunatic's estate with its value. Furthermore, had the plaintiff chosen to proceed at law, instead of in equity, it seems clear that an action in quasi-contract for the value of the old note would have been maintainable.

The case of *Sentance v. Poole*, already referred to, in which it was held that insanity is a real defence, although merely a *Nisi Prius* decision, has generally been regarded as representing the English law; but it must be admitted that a late decision of the Court of Appeal, *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599, is far from being consistent with the notion of a real defence. In that case an insane surety, who had apparently received no consideration for his contract, was held liable in an action on a promissory note, in the absence of proof on his part that the other contracting party had notice. A decision so clearly at variance with true principles of justice will not, it is believed, be allowed by the English courts to remain long as a rule of law.

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THE LAW SCHOOL IN THE EARLY FORTIES.—Through the courtesy of Mr. Arnold, Librarian of the School, the REVIEW is enabled to print selections from two letters received by him from Mr. George W. Huston, of Morganfield, Kentucky, who graduated from the Law School in 1843. These letters, suggesting in a charming way the atmosphere of an early period in the School's rich history, may be of interest to those familiar with the Harvard Law School of to-day.

From the first letter, which is dated February 22, 1897:—

"In daily attendance on the lectures of Judge Story and Professor Greenleaf I have a pleasing remembrance of old Harvard half a century ago. It was easy to draw the old judge from the point under consideration to a lengthy account of Chief Justice Marshall and his fellows, Mr. Wirt, Mr. Webster, etc.

"A simple question during lectures would set the Judge off at a tangent, and this was apt to be done every day. In the winter of '42, Mr. Webster and Lord Ashburton, accompanied by Lord Morpeth, were at Cambridge a length of time settling the Maine boundary question. These three men were in a habit of attending Judge Story's lectures,—access to the library being what brought them to Cambridge.—After an exhaustive consideration of some point, when Judge Story had told what Lord Mansfield thought about it and Chief Justice Marshall's opinion, and when Lord Morpeth had listened with his lips open and his heavy eyelids closed in a negative attitude, for he had inherited gout of many generations, Story would suddenly turn to the old Lord sitting on a bench with the students. 'And what is your opinion my Lord?' Morpeth would suddenly change his whole countenance, gather up his lips and his eyebrows, his eyes sparkling, and would deliver an exceedingly interesting opinion on the point under consideration. Morpeth was one of England's then able men, and it was thought he came as a watch on Ashburton, who, having an American wife, was supposed to be the man to send to settle the boundary question."

From the second letter, which is dated March 10, 1897:—



"The photograph of Dane Hall forcibly brings to my mind younger days. The building had but one room below and a single room above. The Library in the lower, and lecture and recitation room above. The Library had books on shelving on the three sides other than the front. The stairs were next the front wall. In the upper room, rows of benches ten feet long with backs plainly made, and there were our seats. The Professors occupied for two hours each day save Saturday and Sunday a chair at the west end. In winter Judge Story was absent about six weeks in attendance on the Supreme Court at Washington. The Library was used for Moot Courts, [and was] seated with chairs. Often Judge Story held his U. S. Court in the Library instead of at Boston, and the eminent lawyers of that day pleaded their cases not requiring a jury there. . . .

"Professor Greenleaf submitted this question at a Moot Court, and assigned me as one of the attorneys. For an associate (for two were put on each side) by chance a young man from the city of New York was given me. This young man was son of *the* millionaire of New York at that time.—boarded at the Tremont House in Boston, came to class now and then in a fine carriage, match horses, liveried servant, woolly dog, etc. . . . Judge Story was a low, heavy-set man,—very fair skin, blue eyes, with but little hair on his head, being very bald save a little tuft on the top of his forehead which he often combed during lectures with a fine comb carried in his vest pocket. He was easy of access and beloved by the young men. An eloquent lecturer, and often 'loomed,' as the young men called it. He kept up constant letter writing to and with many of the great men of Europe. Professor Greenleaf was taller, black hair in profusion, and keen black eyes. I have heard him say, I believe, he was forty years old before he began studying law in Maine where he was raised. He was not popular with the boys, being sometimes sarcastic. His mind was acute and his reasoning hair-splitting. I was one of a committee he requested to index his book on Evidence, and we worked faithfully to correctly do so. I hardly think, though he adopted our work, that he was satisfied with it."

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GREAT ENGLISH JUDGES — KING'S BENCH. — From 1756 to 1788, William Murray, Baron and later Earl Mansfield, was Chief Justice of the Court of King's Bench. A man of broad learning and culture, an able statesman, an eloquent and convincing debater, and a graceful writer, Lord Mansfield is generally called the greatest of common law judges. Although he introduced in his court certain equitable doctrines which later and more enlightened consideration found to rest on no sound basis, and although he caused wide-spread dissatisfaction and indignation by holding that libel was a question for the determination of the court, yet his decisions on the whole, and especially in the field of mercantile litigation, strengthened and enriched the English law. Lord Mansfield was of Scotch origin, was educated at Oxford, became a member of both Houses of Parliament in turn, held the office of Attorney General, and three times refused an offer of the Great Seal. An account of his brilliant political career would comprise a history of England during his time. He took a prominent part in urging war with America; he was a member of the Cabinet during the perplexing period of the King's insanity; he held general warrants illegal, and reversed the outlawry of the notorious John Wilkes; he was bitterly attacked in certain of the



"Junius" letters; and he was the special object of mob violence during the Gordon "No Popery" riots. For years he fought Pitt in debate in the Commons, and, later, the forensic contest thus begun was carried on between him and Chatham in the Lords. His character, admirable for the noble breadth of his genius, was marred by a certain lack of moral courage and a coldness of affection. He had a passion to be a great judge, and sincerely loved his work. His manner in court and his method of despatching business were excellent; his judgments were perspicuous and in good style. He died in retirement in 1793.

From 1802 to 1818, Edward Law, Baron Ellenborough, was Chief Justice of the Court of King's Bench. He was educated at Cambridge, was made King's Counsel in 1780, and, though originally a Whig, he deserted that party in alarm at the excesses of the French Revolution, and was appointed Attorney General by the Tory government in 1801. As Mr. Law he acted as leading counsel for Warren Hastings in the impeachment trial before the House of Lords; his speech on that occasion, lasting three days, was an excellent specimen of oratorical power. A man of great intellectual vigor and of vast legal knowledge, Ellenborough was a robust but hardly an ideal judge. Though of undoubted integrity, his intolerance of contradiction and his violent prejudices laid certain of his decisions, especially in political cases, fairly open to the charge of partiality. Notorious too was his habit of browbeating juries and of upbraiding counsel. His judgments in mercantile cases, however, stand as high authority. He thought the criminal law could not be too severe, and was influential in passing a bill adding ten crimes to the list of those punishable by death. He was at one time a member of the Cabinet, and refused an offer of the Chancellorship. As a debater in the Lords he was fiery, strong, and effective, but hardly properly courteous to his opponents, beating down their arguments rather than meeting them by logic and reason. In person he was tall and clumsy, with shaggy eyebrows and commanding forehead.

From 1859 to 1875, Sir Alexander James Edmund Cockburn, Bart., was Chief Justice of the Court of Queen's Bench; by operation of the Judicature Acts in 1875, he became head of the Queen's Bench Division of the High Court of Justice and first Chief Justice of England, which position he held till 1880. He came from an old Scotch family, was educated at Cambridge, was reform member for Southampton, Attorney General, and from 1856 to 1859 Chief Justice of the Common Pleas. He refused a peerage. A fluent linguist, and possessed of a singularly expressive and sympathetic voice, he was considered the most pleasingly vivacious and graceful speaker of his time. He sprang into fame by his defence of Lord Palmerston's conduct in the Don Pacifico dispute with Greece. He presided at the trial for perjury of the Tichborne Claimant, delivering an exhaustive summing up which lasted eighteen days; and he was one of England's arbitrators in the settlement of the Alabama Claims at Geneva, dissenting from the award as being excessive. Cockburn was a good judge; his opinions were well expressed, and his conduct of trials at Nisi Prius was admirable. He had not in youth, however, laid the foundations for a comprehensive legal education, that period of his life having been devoted to pleasure rather than to industry, and much of his learning was acquired from sitting on the bench with Mr. Justice Blackburn. A man of great magnetism and charm, his personality stands out more clearly than his merely judicial character. He was

fond of society, of yachting, of the opera, of all amusements; he was a capital host, and used to gather at his famous table the brilliant and interesting people of the day. In the street he is said to have appeared "for all the world like a groom taking a holiday," but on the bench his presence was dignified and imposing.

## RECENT CASES.

**AGENCY — MASTER AND SERVANT.** — Plaintiff was sent with a horse by his employer to do work for defendant. He was under the immediate control and direction of the defendant's foreman, and while engaged in the work was injured by negligence of one of defendant's servants. *Held*, that he was not a servant of defendant so as to fall within the fellow-servant rule. *Murray v. Dwight*, 44 N. Y. Supp. 234.

The court go on the ground that the defendant did not select and hire the plaintiff, and suggest also that *Quarman v. Burnett*, 6 M. & W. 499, indicates that the hiring of the horse with the driver puts the case on a different basis from the hiring of one's servant alone. This suggestion hardly appeals to one's reason, and the dissenting judge seems to take a better view in following *Hasty v. Sears*, 157 Mass. 123, and *McInerney v. Canal Co.*, 151 N. Y. 411, which hold the fact that the plaintiff was under the defendant's control as to details to be the decisive circumstance in determining their relation. This rule was followed also in a recent Massachusetts case, *Samuelian v. American, &c. Co.*, 46 N. E. Rep. 98.

**BILLS AND NOTES — DESTROYED NOTE — INDEMNITY.** — *Held*, that the holder of a note which is destroyed may recover on the note without giving a bond of indemnity. *Filley v. Turner*, 47 Pac. Rep. 1037 (Col.).

It seems reasonable, considering the uncertainty of all proof, to require the plaintiff to indemnify the maker against any possibility of future annoyance or expense in the matter, even where the note is found by the jury to have been destroyed. This is the logical result of the reasoning in *Hansard v. Robinson*, 7 B. & C. 90; see Story, Prom. Notes, 5th ed. § 449; and it is the practice in England under 45 and 46 Vict. c. 61, §§ 69 and 70; Byles on Bills, 5th ed., 392, n. It is also the law in a few American jurisdictions. *Welton v. Adams*, 4 Cal. 37; *Dumas v. Powell*, 2 Dev. & B. Eq. 122; *Irwin v. Planters' Bank*, 1 Humph. 145. The weight of American authority is, however, in accord with the principal case. *Sebree v. Dorr*, 9 Wheat. 558; *Palmer v. Logan*, 4 Ill. 56; *Des Arts v. Leggett*, 16 N. Y. 582; *Moses v. Trice*, 21 Grat. 556.

**BILLS AND NOTES — EXECUTION.** — In an action by payee against a surety upon a promissory note, *held*, that the execution of a note includes its delivery, and therefore a denial by a surety of the authority of the maker to deliver the note without the signature of the co-surety is, in substance, a plea of *non est factum*. *Lomax v. First Nat. Bank*, 39 S. W. Rep. 655 (Tex.).

The court appears to have reached a sound result on the facts, but the reasoning seems erroneous on principle. The note was in effect delivered to the maker in escrow, and then in breach of the condition delivered to the payee. But it is difficult to see how it can be said that there was no delivery, and that the two essentials of execution, signing and delivery, were not present. The correct theory in such cases is that there is due execution, but that such an agreement as was made here may be a personal defence, effective, as in this case, because the payee had notice, and that the plea is an equitable one, and not *non est factum*. On the principles adopted by the court, the settled law, that if plaintiff here had had no notice or had been a *bona fide* vendee of the payee, he could have recovered, can be worked out only on the theory that the defendant would have been estopped to deny execution. But this would throw the burden of establishing *bona fides* and value on the plaintiff, whereas it should rest upon the defendant, who seeks to avoid the effect of execution; and this is a very practical objection to such a theory. See *Marston v. Allen*, 8 M. & W. 494; *Bell v. Viscount Ingestre*, 12 Q. B. 317, for forms of pleas in cases of indorsements under like circumstances.

**CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS.** — A statute of Texas provided that life insurance companies failing to pay a loss within the time specified in the policy should be liable to pay the holder twelve per cent of the amount of the loss,



in addition thereto, and a reasonable attorney's fee for the collection of the loss. *Held*, this statute is constitutional. *Fidelity & Casualty Co. of N. Y. v. Allibone*, 39 S. W. R. 632 (Tex.).

In *Ry. Co. v. Ellis*, 17 Sup. Ct. Rep. 255, a Texas statute providing for the imposition of \$10 extra costs on railroads resisting the payment of certain claims, was declared unconstitutional by the United States Supreme Court. See 10 HARVARD LAW REVIEW, 524. The court in the present case allude to this federal decision, and admit that the statute there declared unconstitutional is analogous to the one before them. They say, however, that they are not obliged to follow that case except when the same facts are presented, and assert that in their opinion the State legislation is valid. It would seem that there may well be a rational basis for the class legislation in the principal case, and consequently the Texas decision is to be preferred to that of the Supreme Court of the United States.

CONSTITUTIONAL LAW — EX POST FACTO LAWS — THE POLICE POWER. — A statute provided that no person should practice medicine in the State who had ever been convicted of a felony. *Held*, that the statute applied to persons who had been convicted before its passage, and as to such of them as were not at the time engaged in the practice of medicine, was not invalid as an *ex post facto* law. *People v. Hawker*, 46 N. E. Rep. 607 (N. Y.). See NOTES.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — TAXATION. — *Held*, that a statute exempting from taxation city waterworks is invalid, being the exemption of an enterprise which is not of a public nature. Those only are public purposes which relate to the government of a city, and not those which are but incidentally beneficial to the citizens. *City of Covington v. Commonwealth*, 38 S. W. Rep. 826 (Ky.).

What is within a public purpose is perhaps best regarded as a question for the legislature, and their decision should not be set aside unless clearly an error. *Perry v. Keene*, 56 N. H. 514. Thus, the courts have generally regarded a railroad as within a public purpose. *Ry. v. Otis*, 16 Wall. 667. But they have considered manufacturing institutions too far over the line to admit of exemption from taxation. *Loan Assoc. v. Topeka*, 20 Wall. 665. It is difficult to reconcile the principal case with these views. It is true that a city can have inviolable private rights apart from its governmental functions; 1 Dillon on Municipal Corporations, 4th ed., §§ 66 *et seq.*; and it has been held, as in *Weston Sinking Fund Soc. v. Penna.*, 31 Pa. St. 183, that a city can own and operate business enterprises as an individual. But though a city waterworks company might not be a public business in the sense of being under the absolute control of the legislature, it is difficult to see how an enterprise belonging to the city, and therefore contingently dependent upon local taxation for support, can be so clearly without a public purpose as to warrant a decision that its exemption by the legislature is invalid. The decision, however, is in accord with earlier Kentucky decisions. *Commonwealth v. Makibben*, 90 Ky. 384.

CONTRACTS — ANTI-TRUST LAW. — *Held*, that the Act of July 2, 1890, known as the Anti-Trust Law, providing that every contract in restraint of trade among the several States shall be illegal, applies to a contract between competing common carriers by rail, forming an association for the purpose of maintaining and regulating rates, whether such contract would have been legal or illegal at common law, and whether the restraint thereby put on trade is reasonable or not. *United States v. Trans-Missouri Freight Association*, 17 Sup. Ct. Rep. 540; White, Field, Gray, and Shiras, JJ., dissenting.

A discussion of this extremely interesting decision, which is of extraordinary practical importance, will be found among the leading articles in this number of the REVIEW.

CONTRACTS — INSTALMENTS — IMPOSSIBILITY OF FULFILMENT. — A contracted to put in an elevator for B for \$2,500, one half to be paid when the engine was on foundation and the rest when the whole was completed. Soon after the engine was on foundation the building was burned. *Held*, that A could recover the first instalment, but could get nothing for what was done after the first instalment was earned. *Siegel v. Eaton & Prince Co.*, 46 N. E. Rep. 449 (Ill.).

There can be no doubt of the correctness of the first part of the decision. A right of action for the first instalment had accrued, and there is no good reason why the later destruction of the property should discharge the defendant. The second part follows the English law, but is rather against the weight of American authority. It seems, however, correct on principle. Recovery for the later work must be in quasi-contract, but the whole doctrine of quasi-contracts is grounded on benefit to the defendant, and here the defendant apparently received no benefit whatever. Accidental destruction of the building should excuse the plaintiff from further performance, but

should give him no right of action for work, labor, and materials. See Keener on Quasi-Contracts, 253 *et seq.*

CONTRACTS — INSURANCE — PROVISION FOR ARBITRATION. — The rules of an accident insurance association provided that all matters in dispute should be submitted to the superintendent, whose decision should be final, subject to appeal to the advisory board, whose decision should be absolutely final. *Held*, that a member could recover insurance for injuries received, although his claim had been duly considered and rejected by the superintendent, and no appeal had been taken. *Voluntary Relief Dept. v. Spencer*, 46 N. E. Rep. 477 (Ind.).

The statement of the court that no appeal need be taken before bringing action seems quite inconsistent with *Supreme Council v. Forsinger*, 125 Ind. 52. The whole subject of provisions for arbitration is in a chaotic condition, but the jealousy of the courts towards such provisions seems to be breaking down. There seems no good reason on principle why the parties to a contract may not provide that all questions of fact at least, arising fairly and directly out of the contract, should be determined by arbitrators, whose decision on all questions properly before them should be accepted and enforced by the courts, in the absence of proof of fraud or evident mistake. The contract would still involve questions enough for the courts, and their jurisdiction would not be interfered with to any injurious extent.

CONTRACTS — VALIDITY — APPEAL. — *Held*, that a contract whereby one partner sells to another all his interest in the furniture and stock in their saloon, including the license held by the seller, is not void because the transfer of the license is illegal, since the legal consideration is distinguishable from the illegal, and is sufficient to uphold the contract. *Pierce v. Pierce*, 46 N. E. Rep. 480 (Ind.).

This case, although following an earlier one in the same State (*Strahn v. Hamilton*, 38 Ind. 57), does not seem to be sound. The consideration in this case is so unified that the attempt to separate it into its legal and illegal elements can find little support. The sale of the license was the foundation of the whole contract, and the extremely important point that without it the stock in trade was practically valueless does not receive from the court the attention which it merits. Cases where the consideration was apparently much more separable, but which have nevertheless been decided the other way, are numerous. *Edward Co. v. Jennings*, 35 S. W. 1053 (Tex.); *Bishop v. Pulmer*, 146 Mass. 469; and *Bliss v. Nagus*, 8 Mass. 46, are particularly in point.

CORPORATIONS — RECEIVERS — LIABILITY ON CONTRACTS OF COMPANY. — *Held*, that the receivers of a railroad company are not liable for their refusal to carry plaintiff on a ticket issued by the company before the receivership. *Casey v. Northern Pacific R. R. Co.*, 48 Pac. Rep. 53 (Wash.).

A receiver does not stand in the place of the corporation or person over whom he is appointed, but is an arm of the court to administer the assets for the benefit of all who are interested in the property. As such he cannot pay debts incurred by the corporation unless they constitute a lien on the property, and he cannot be compelled to carry out the contracts of the company unless he has accepted some benefit therefrom, in which case he will be liable *pro tanto*. That the plaintiff has already paid money for the ticket does not give him any greater right to call on the receiver to honor the ticket. It merely gives him a right to come in as a general creditor for the price of the ticket. A similar case was *Central Trust Co. v. M. & N. G. Ry. Co.*, 51 Fed. Rep. 15, where freight money paid to the company was held not to entitle the plaintiff to sue the receiver for refusal to carry the goods.

CRIMINAL LAW — CONSPIRACY — OFFICERS OF CORPORATION. — The officers of a corporation are not, as regards their criminal liability, a single person in respect to corporate acts, and therefore they may be guilty of conspiracy therein. *People v. Duke*, 44 N. Y. Supp. 336.

The exact limits of the criminal liability of corporations are not, perhaps, as yet so clear as could be desired, although they may plainly be liable for some sorts of crimes, particularly those created by municipal regulation, where the doctrine of criminal intent plays no part, and others of similar nature. *Reg. v. Great North Ry. Co.*, 9 Q. B. 315; *Rex v. Medley*, 6 C. & P. 292. It is to be noticed, however, that the present case does not specifically decide that the corporation, as such, may not be liable, but holds that the individual members of it may also be. This seems correct on principle. There is no reason in the nature of things why an individual cannot be guilty of a particular crime, whether or not the corporation of which he is a member is also guilty. The implication of an earlier New York case, *People v. England*, 27 Hun, 139, seems in line with this view.



**CRIMINAL LAW — SALE OF LIQUOR WITHOUT LICENSE — BURDEN OF PROOF.** — *Held*, that, under an indictment for selling liquor without a license, the burden is on defendant to show that he had a license. *State v. Shelton*, 48 Pac. Rep. 258 (Wash.).

This decision is against the general rule, that in a criminal prosecution the State must prove all the essential elements of its case; it is, however, supported by an overwhelming weight of authority, though in Kansas and North Carolina it has been held that the State has the burden of proof as to the non-existence of a license, and in Wisconsin that it has the burden of going forward with evidence. The rule putting the burden of proof upon the defendant is based on very obvious considerations of public policy and convenience. It is hard to prove a negative, and the subject matter is peculiarly within the knowledge of the defendant, and if he has a license he can easily show it. See 1 Greenl. Ev. § 79; Black, Intox. Liq., § 507.

**DAMAGES — AVOIDABLE CONSEQUENCES.** — A wrongfully dug ditches on B's land while A held it as tenant. The cost of filling the ditches was less than the depreciation in the value of the land would be if the ditches were allowed to remain. *Held*, that the measure of damages was the cost of filling the ditches. *Doss v. Billington*, 39 S. W. Rep. 717 (Tenn.).

It must be assumed that the action is brought after the termination of the tenancy, for it would be difficult to find any damage to the reversion so long as the tenant could fill the ditches. The court discuss the case as though it were one of the class illustrated by *Brewing Co. v. Compton*, 142 Ill. 511, which was an action for a nuisance caused by water dripping from defendant's eaves on plaintiff's property. But such an action is based on a wrongful act, "giving rise to a continuous series of torts which can be brought to an end by the defendant discontinuing the act." 1 Sedg. Dam., 8th ed., § 91. The principal case falls rather into the class in which the action is for a single tort of the defendant, further damage from which can be prevented by plaintiff, and hence will be regarded as the result of his own negligence if not avoided. *Loker v. Damon*, 17 Pick. 284. If the cost of filling exceeded the depreciation in value, the latter would probably be the measure of damages, for it would not be reasonable ordinarily to endeavor to avoid a small loss by incurring a larger one. *Le Blanche v. L. & N. W. Ry. Co.*, 1 C. P. D. 286.

**EVIDENCE — COLLATERAL WRITINGS.** — *Held*, that parol evidence is admissible to prove the contents of writings which are merely collateral to plaintiff's cause of action. *Engel v. Eastern Brewing Co.*, 44 N. Y. Supp. 391.

The distinction between the manner of proving the contents of writings which are the foundation of a claim, and those which are merely collateral to it, is everywhere recognized. *Coonrod v. Madden*, 126 Ind. 197. But the reasons for the distinction are not often clearly stated. The explanation is thought to lie in purely practical considerations. Where a writing is fundamental, it is right to require that it should be produced, or a valid excuse shown; but where the writing is merely collateral, it is asking too much to require a party to produce it, because, such matters being likely to come up unexpectedly, he cannot fairly be supposed to have it within reach.

**EVIDENCE — PRESUMPTION AS TO FOREIGN STATUTES.** — *Held*, that, where the statutes of another State are not introduced in evidence, they will be presumed to be the same as the statutes of the State in which the action is brought, upon the same subject. *Scott v. Beard*, 47 Pac. 986 (Kan.).

The language of the principal case, though often repeated, is inaccurate. The question is not one of presumption, but of judicial notice. When the parties lay their case before the court of a State, that court must try the case by the law which it knows judicially. If one of the parties wishes to rely on a statute or an interpretation of the common law obtaining in another State, he must allege and prove it like any other fact. That is all the court means in its decision, and to express in terms of presumption the well settled doctrine that a court does not take judicial notice of foreign law is misleading.

**EVIDENCE — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT.** — *Held*, that directions given to an attorney as to the drawing of a deed are not privileged communications. *Sommer v. Oppenheim*, 44 N. Y. Supp. 396.

In the earlier cases on this subject, it was thought that only such communications were privileged as were made to the attorney with regard to a suit pending or in contemplation. But the courts soon did away with this restriction, and extended the privilege to communications made during a consultation with the attorney as to the rights and liabilities of the client, though no suit was in contemplation. *Greenough v. Gaskell*, 1 Myl. & K. 98. On the same principle, the better doctrine would seem to be that communications made to an attorney with regard to drawing up a deed are privileged. *Parker v. Carter*, 4 Munf. (Va.) 273.

**INTERNATIONAL LAW — FORFEITURE OF VESSEL.** — *Held*, that under Rev. Sts. § 5283, forbidding the fitting out of a vessel "to be employed in the service of any foreign prince or of any colony, district, or people," against a government with which the United States are at peace, a vessel fitted out to be employed in the service of the Cuban insurgents against the King of Spain, although such insurgents had not been recognized as belligerents, was properly forfeited. Mr. Justice Harlan dissenting. *The Three Friends*, 17 Sup. Ct. Rep. 494. See NOTES.

**PRACTICE — COSTS — NEW TRIAL FOR NOMINAL DAMAGES.** — In a libel suit, under instructions of the judge, plaintiff was entitled to nominal damages. The jury found for the defendant, and judgment was rendered on the verdict, carrying a bill of \$300 costs against plaintiff, including an extra allowance. A new trial was refused. On appeal, the extra allowance was struck out, but *held* that where the mere question of costs is involved, a new trial will not be granted because the jury found for the defendant instead of giving nominal damages to the plaintiff. *Funk v. Evening Post Pub. Co.*, 46 N. E. Rep. 292 (N. Y.).

In New York, a plaintiff in a libel suit, on final judgment in his favor, is entitled to costs; but where the damages are less than \$50, the costs must not exceed the damages. N. Y. Code Civ. Proc., § 3228. Under this provision it seems that the principal case denies the plaintiff a substantial right important to him in avoiding costs. *Eaton v. Lyman*, 30 Wis. 41; *Potter v. Mellen*, 36 Minn. 122; *Leat & Robinson v. Moreland*, 7 Humph. 675. In spite of the statute, the case represents the New York law as it has stood for almost a century; see *Stephens v. Wiler*, 32 N. Y. 351, where the court speaks of the New York rule as a salutary one, preventing useless and vexatious litigation. The criticism in Sedgwick on Damages, 8th ed., 154, of the general rule to the contrary, as engendering litigation, may be just, and the New York rule salutary, but it seems to be a matter for the legislature to deal with rather than the courts.

**PROPERTY — CANCELLATION OF COVENANTS.** — A conveyed to B with warranty; B reconveyed to A with like warranty. *Held*, that the covenants are mutually cancelled, and a purchaser from A cannot sue B for a defect in title existing before A's deed to B. *Green v. Edwards*, 39 S. W. Rep. 1005 (Tex.).

Wherever this question has arisen it has been decided as above since the Year Books; Rawle on Covenants, 5th ed., § 223. The reason for this is not clear. If B's only object was the mutual cancellation of covenants, he proceeded in an awkward manner. An arbitrary line is drawn by this case, for a covenant not to sue one of two joint specialty obligors does not operate as a release, "for it is only a covenant," although an actual release of one releases all. *Lacy v. Kingston*, 1 Ld. Raym. 688. The principal case seems to contain "only a covenant." The reason given for the principal decision is that it prevents circuity of action, and, in fact, it seems to be the result of the unconscious application of this equitable doctrine by the common law courts. Cf. *Kellogg v. Wood*, 4 Paige, 578, 615; *Platt on Covenants*, 593. But circuity of action is a defence only between A and B in the principal case, primarily for the protection of the court, and unlike fraud, which may vitiate the contract in a subsequent party's hands. Compare the case of the transfer and retransfer of negotiable paper, where a subsequent holder may sue on the indorsements, though the circuity of action is apparent on the paper.

**PROPERTY — DEED — DELIVERY.** — A grantor signed and sealed a deed of gift and delivered it to a deputy recorder with instructions to register it, intending at the same time that title should pass to the grantee. Before the deed was recorded, the grantor recalled it, the grantee knowing nothing of the deed until after the recall. *Held*, that title passed to the grantee on the delivery of the deed to the deputy, since the delivery was complete. *Robbins v. Rascoe*, 26 S. E. Rep. 807 (N. C.).

The cases which hold that a grantee may presumptively accept a benefit, although unknown to him at the time, lay down the better working rule and at the same time represent the numerical weight of authority: *Mitchell v. Ryan*, 3 Ohio St. 377; the contrary view, however, is ably maintained in *Welch v. Sacket*, 12 Wis. 243. The delivery to the deputy in the principal case appears to have been an absolute one, since he intended to pass title, and hence the delivery was irrevocable. The fact that the deed had not been recorded should not alter the case. The true test is whether the grantor had put the instrument out of his control. *Phillips v. Houston*, 5 Jones (N. C.), 302. But if the grantor retains control over the deed in any way, even the registry of a deed, although strong evidence of a delivery, may be rebutted. *Maynard v. Maynard*, 10 Mass. 456; *Mitchell v. Ryan*, *supra*.

**PROPERTY — REVIVAL OF DEBT BY EXECUTOR.** — *Held*, that a promise by an executor, made after the statute has run, cannot revive a debt against the estate.



*Dictum*, that a promise by an executor during the running of the statute will not bind the estate. *Balz v. Underhill*, 44 N. Y. Supp. 419.

Both the decision and the *dictum* seem sound, though directly opposed to *Johnson v. Beardslee*, 15 Johns. 3 (not cited in principal case). The law on the subject of revival, especially by executors, is in great confusion, owing to the misconception of the statute by the English courts, especially in Lord Mansfield's time, as harshly depriving creditors of their just dues. The statute is really one of repose, based on sound public policy; Story, J., in *Bell v. Morrison*, 1 Pet. 360, 363. As matter of law, a man who has made a new promise before or after the statute has run may be charged, in fact, though not necessarily in pleading, as on a new contract based on the original consideration. Banning, *Law of Limitations*, 2d ed., pp. 46, 47; Buswell, *Limitations and Adverse Possession*, 59, 60. This is all very well as to the debtor, but when it comes to charging the estate on the executor's promise a difficulty arises. If the estate is charged on the theory of a new contract, the court is met by the established rule that an executor has no power to bind the estate with contracts; on the other hand, the doctrine of a continuation of the original promise is now discarded as a ground of decision against the debtor himself. *Fritis v. Thomas*, 1 Whart. 66, and authorities *supra*. The decision and suggestion in the principal case avoid this dilemma, besides appealing to common sense. Even if the new promise of a debtor is regarded as a waiver of a defence, as perhaps it should be, there seems to be no reason for allowing an executor to waive this defence, so causing loss to the other creditors.

PROPERTY — RIGHTS OF ABUTTERS TO ACCESS — INJUNCTION. — A bill, filed by a hotel keeper, alleged that the defendant, by allowing his hacks to stand in front of the plaintiff's hotel, obstructed the guests in their reasonable access to the hotel, to the injury of the plaintiff. *Held*, that an injunction should be granted. *West v. Brown*, 21 So. Rep. 452 (Ala.).

The case is undoubtedly right; a carriage driver may stop before the house of another so long as his use of the street is reasonable. He must move if not actually engaged in leaving or receiving passengers or baggage, if asked to, or even without being asked, if it is clear that he is in the way. The abutter has a primary right to use the street on which he abuts, for reasonable access and egress. The carriage has a right to be there, moving out of the way when impeding access. If the obstruction is subsisting, equity will relieve by injunction. *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713.

PROPERTY — RIPARIAN LAND — ADVERSE POSSESSION. — The defendant obtained, by adverse possession, land bounded by a stream. *Held*, that he did not acquire title constructively to the middle of the stream. *Stanberry v. Mallory*, 39 S. W. R. 495 (Ky.).

The rule that, where a grant is made of land bounded by a stream, the grant extends to the middle of the stream, was properly held not to be applicable to land acquired by adverse possession. In order to hold adversely land not actually occupied, a good paper title must be shown in addition to the land constructively claimed being reasonably appendant to that actually occupied. *Jackson d. Gilliland v. Woodruff*, 1 Cowen, 276. *Doe v. Campbell*, 10 John. 156. *Simpson v. Downing*, 23 Wend. 316. The Statute of Limitations does not aid the claimant, as no action could have been maintained against him for the bed of the stream, since he did not occupy it. If his claim had been based on the fiction of a lost grant, the result would be the same. *Corning v. Nail Factory*, 34 Barb. 529.

PROPERTY — TAXATION OF COLLEGE DWELLING-HOUSES. — The officers of a college occupied dwelling-houses owned by the college, for which they paid rent, and which they exclusively controlled. *Held*, that the property was not exempted from taxation by a statute exempting from taxation real estate of a college when occupied by it or its officers for the purposes for which it was incorporated. *Williams College v. Williamstown*, 49 N. E. R. 394 (Mass.).

The case is perhaps of more practical than legal importance. The principal followed is well established; it is not enough that the income of the property is applied for the purposes of the corporation, but the real estate must itself be occupied for these purposes. *Mt. Hermon Boys' School v. Inhabitants of Gill*, 145 Mass. 148. It is immaterial that no rent is paid. *Third Congregational Soc. v. Springfield*, 147 Mass. 396.

PROPERTY — WATERCOURSES — DRAINAGE. — Defendant drained surface water by ditches into a stream on his own land, so that it overflowed on plaintiff's land. *Held*, that he may do so though it damages plaintiff's land. *Misell v. McGowan*, 26 S. E. Rep. 783 (N. C.).

This rule is followed in some States; *Hughes v. Anderson*, 68 Ala. 280; *Peck v. Herrington*, 109 Ill. 611; and is supported by the fact that it facilitates the reclaiming

of swamp lands. But it is hard to see how civilization is advanced by allowing one man to drain his swamp at the expense of another's meadow, and the doctrine that a landowner may not so drain his lands as to overtax the capacity of a stream and flood lands below him, seems sounder. *Noonan v. City of Albany*, 79 N. Y. 470, cited with approval in *McCormick v. Horan*, 81 N. Y. 86.

**TORTS—ABUSE OF LEGAL PROCESS.**—*Held*, that, if a person causes a subpoena to issue against another for the alleged purpose of securing his attendance as witness in a case, but in reality only in order to compel him to pay a claim, this is an abuse of legal process for which the party against whom the subpoena is issued can recover damages. *Dishaw v. Wadleigh*, 44 N. Y. Supp. 207. (See NOTES.)

**TRADE-MARKS—ASSIGNABILITY OF ORCHESTRA NAME.**—A organized a band of musicians called the "Fadette Ladies Orchestra." She sold to plaintiff her rights in the organization, together with right in the name. On a bill to enjoin the use of a similar name by defendants, *held* that, so far as A had any right in the trade-name, it was personal to herself, depending upon her personal reputation and skill, and it was not assignable. "It is well settled that the courts will not enforce a claim of this kind which contains a misrepresentation to the public." Lathrop, J. dissenting. *Messer v. The Fadettes*, 46 N. E. Rep. 407 (Mass.).

The general principle asserted by the majority is clearly correct, for plaintiff must come into equity with clean hands. But it is difficult to see any misrepresentation here. If the name had been "A's Orchestra," implying her connection with it, it might be argued that its use by an assignee would misrepresent. But the name actually used seems to imply a musical organization only, and if the court mean to assert as a broad doctrine that in no case can such a name be assigned, it would seem an unfortunate decision. It is difficult to distinguish such a name from any business name, as, for instance, that of a hotel, which becomes of great value, if at all, through the personal reputation and skill of its founder. Yet hotel names are clearly assignable. *Wood v. Sands, Cox*, Man. Trade-Mark Cas., No. 467.

**TRUSTS—BONA FIDE PURCHASE AT EXECUTION SALE.**—*Held*, a bona fide purchaser of land at a foreclosure sale, who pays the price and takes the certificate of sale, is not affected by subsequent notice of equities, though received before the execution of the sheriff's deed. *Duff v. Randall*, 48 Pac. Rep. 66 (Cal.).

By the California statute, a purchaser at an execution sale acquires the title of the judgment debtor, subject to redemption within six months, at the expiration of which time he is entitled to a sheriff's deed. Cal. Code Civ. Proc., §§ 700-703. The principal case is right; Freeman on Executions, 2d ed., § 336; and it presents an interesting analogy to the case of the transfer of stock certificates where notice of equities is given before the transfer on the company's books, a case as to which the law is not yet generally settled. In considering this analogy, it is to be remembered that the sheriff occupies two positions, — one analogous to that of the assignor of stock, and the other to that of the stock company. Both in the case of the stock certificate and in that of the sheriff's certificate the assignor has done all that is required of him; in both cases the assignee has gained a right to the performance of an affirmative legal duty, in the one case by the sheriff, in the other by the company. It is not a mere equity; it is a legal right, and so is not affected by subsequent notice. Lowell, Transfer of Stock, § 99; 1 HARVARD LAW REVIEW, 5, 6; Ames's Cases on Trusts, 2d ed., p. 299, note.

**TRUST—CONSTRUCTIVE TRUST.**—A gave her husband, X, money to invest in a lot for her. X added money of his own, and purchased, taking title, without knowledge of A, in his own name. The lot, at A's request, having been sold, a second lot, of her own selection, was purchased with X's own money, he again taking title. With further funds furnished by A, in belief of ownership in the lot, X built a house thereon. *Held*, that A's rights in equity were inferior to those of a subsequent levying creditor of X. *Clark v. Timmons*, 39 S. W. Rep. 534 (Tenn.).

The decision is indefensible. Although no direct authority is to be found, a judgment creditor in Tennessee seems to have only the rights of his debtor, and not those of a purchaser. It follows that the court errs in two respects. First, it assumes that X owned the second lot free from equities, because it was not purchased with any of the proceeds of the first, to which equities were attached. But if a fiduciary appropriates funds of his own in the purchase of property to replace the original trust property, he will hold the latter upon the original trust. *Houghton v. Davenport*, 74 Me. 590; *Perkins v. Perkins*, 134 Mass. 441; *Van Alen v. Am. Bank*, 52 N. Y. 1; *Baker v. N. Y. Bank*, 100 N. Y. 31. Secondly, even upon the assumption that the lot was the trustee's own, if a fiduciary employs a trust fund in improving his own estate, the *cestui* has a lien for the amount misapplied, so far as it is traceable in the improvements.



2 HARVARD LAW REVIEW, 28; *Dyer v. Jacoway*, 42 Ark. 186; *Burt v. Timmons*, 29 W. Va. 441; *Brazel v. Fair*, 26 S. C. 370; *Cavin v. Gleason*, 105 N. Y. 256; *contra*, *Cross's Appeal*, 97 Pa. 471. The case is decided upon "the familiar rule that a trust must result, if at all, at the instant the legal title vests in the grantee, and the use of the money was subsequent to the conveyance of the lot." One citation from Perry on Trusts is the authority for this "familiar" rule. But there is to-day a well recognized doctrine of constructive trusts, one species of which is the so called "resulting trust."

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## REVIEWS.

DOMESDAY BOOK AND BEYOND: Three Essays in the Early History of England. By Frederic William Maitland, LL.D. Cambridge (Eng.) and Boston. 1897.

We might hardly have known, but for Professor Maitland, that a book may contain between its two covers both good law and good literature, — not in several parcels, but *per my et per tout*. Each new book of his makes this delightful truth the plainer. With his latest work he enters the common ground, the *mark*, of three sciences; for history, economics, and law are alike interested in the field he is tilling, and his results are of high importance to the student of each science. The history, the economy, and the law of the old English boroughs, vills, and manors must henceforth be studied with Professor Maitland's arguments and conclusions in mind. It is, however, the interest of the lawyer in this work that we must chiefly emphasize.

This is an introduction to Pollock and Maitland's already classic History of English Law; though, like many introductions, it is most profitably read, as it was published, after that to which it leads. It has the good qualities, both legal and literary, of the larger work; though it must be confessed that its conclusions are oftener reached by enlightened guess-work since less evidence is at hand.

The student of legal history will here find our land law in the making. He is familiar with the process in other branches of the law. The law of torts, for instance, has become a body of legal principle before his very eyes, wrought out of a few original writs and an enlightened statute by courts whose decisions are found in modern reports. In the law of torts the process is almost finished, in the law of contracts it is hardly begun. Each contract is still treated as an independent obligation, subject to few general rules after it has once come into being; one can still oblige himself as he will. The premature attempt of Lord Holt and Sir William Jones to force bailments into a Procrustean bed utterly failed. But the law of real property seemed to have been wrought into an absolute uniformity in the prehistoric time of our law. Tenures when we first knew them were fixed and few; servitudes were conformable to known types, and novel ones could not be created; manors had a rigid organization; ranks of men had established rights; and seignorial justice appeared to be a settled institution. Even equity, which still sometimes gives effect to special agreements touching land, will not go far afield. But in this study of Domesday Book, and the "beyond" which came before it, we see a state of affairs where every dealing with land was special, tenures were as various as tenants, and freedom and slavery were relative terms. We see how entire freedom of contract in dealing with land resulted in

the establishment of a few chief types, and these were at last merged in the feudal system as we know it. We see, in short, how true law is formed, by the persistence of that one of all usual customs which is best adapted to the existing society. Law like life is a survival of the fittest.

Professor Maitland seems fully to have established his important thesis as to the nature of the Domesday manor. This was not at all the manor we know, with its technical characteristics; it was merely the geldable unit, whether large or small. It might be the enormous seat of a magnate, with dependencies sprawling through a half-score hundreds, it might be the few acres of a poor peasant; the home of every man who paid his geld to the King's officers directly, not through another subject, was a manor-house; of interest to the King because he must send there to collect taxes.

All disputed questions with regard to early institutions are adequately discussed. The borough, the vill, sake and soke, folk-land and book-land are illuminated in turn. Professor Maitland is perhaps the first author who in the light of modern scholarship takes the old view of the vill. He believes in a settlement of independent freemen (not a community in a legal sense) each owning his land in severalty and cultivating a hide of 120 acres, be the acres larger or smaller. Whether we agree with this conclusion or not, we must rejoice that it is at last supported by a well equipped scholar, and—may we not add, with the egotism of our own science—in a thoroughly lawyerlike way.

Indeed the method of investigation is the very life of the work. It is the sound method of working gradually back from the known to the unknown. We read our Bede and our Tacitus, not in the electric glare of modern scholarship, which destroys the finer shading, but with the candle of Bracton and the rushlight of Domesday. "If, for example, we introduce the *persona ficta* too soon, we shall be doing worse than if we armed Hengest and Horsa with machine guns, or pictured the Venerable Bede correcting proofs for the press; we shall have built upon a crumbling foundation. The most efficient method of protecting ourselves against such error is that of reading our history backwards as well as forwards, of making sure of our middle ages before we talk of the 'archaic,' of accustoming our eyes to the twilight before we go out into the night."

J. H. B.

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SELECT CASES IN CHANCERY. 1364 to 1471. Edited for the Selden Society, by William Paley Baildon. London: Bernard Quaritch. 1896.

This latest publication of the Selden Society is a solid contribution to the history of equity jurisdiction. In his excellent introduction the editor has indexed the cases in this volume, and also the earliest cases in the first two volumes of the Calendars of the Proceedings in Chancery, published in 1827. The reader is thus enabled to fix pretty clearly the beginning of many doctrines in equity. For example, case 83 (1396-1403) is the earliest instance of a bill for specific performance, and case 142 (1456) is the first case in which it appears that the plaintiff obtained a decree upon such a bill. It is noticeable that there are only four such bills in the century covered by this volume. The earliest bills against feoffees to uses were either at the very end of the fourteenth or at the beginning of the fifteenth century. As there is no mention of a



decree in these early cases, we may still credit the statement in the prayer by the Commons in 1402, 3 Rot. Parl. 511, that there would be no remedy against feoffees to uses unless one were ordained by Parliament. The oldest bill in this new collection of cases was for the cancellation of a bond on the ground of duress, case 134 (1337).

Case 116 is interesting, as confirming the statement in 3 HARVARD LAW REVIEW, 33, that according to mediæval conceptions a bailment was a strictly personal obligation. The plaintiff, on going to Jerusalem, delivered a coffer containing title deeds to his mother to keep for him until his return. His mother died during his absence, and the coffer came to the hands of his step-father, who refused to give it up to the plaintiff. The latter sought relief in equity, "because he (the step-father) was not privy nor party to the delivery of the said coffer to his said wife, in which case no action is maintainable against him at common law."

The editor tells us that one bundle of dateless petitions remains for future investigation. We trust these may soon be printed. Then we may fairly expect from some competent hand a truly satisfactory History of Equity Jurisdiction.

J. B. A.

HISTOIRE DU CONTRAT D'ASSURANCE AU MOYEN AGE. Par M. E. Bensa. Traduit de l'Italien par M. Jules Valéry. Paris: Albert Fontemoing. 1897. pp. xvi, 108.

In the most ancient documents concerning commercial contracts in the Middle Ages are to be found provisions by which one party undertook the risks of the sea, or cast them upon the other party. It was soon perceived that the differences in the amount to be paid in commercial contracts of identically the same character, according as the risk of loss was included or excluded, could be calculated by a regular scale. Then a third party stepped in, offering to assume the risk of loss on payment to him of this difference; and thus came into existence true contracts of insurance. In this learned monograph, written three years ago by M. Bensa, Professor in the University of Genoa, and now translated into French by M. Valéry, is described the origin of the contract of insurance in Italy during the first half of the fourteenth century, its development and the formulation of laws governing it in that country, and finally its adoption by the Spanish merchants at Barcelona in the fifteenth century and the appearance of the celebrated Ordinances of Barcelona, by which the practice of insurers was regulated throughout Europe. Some of the most interesting portions of this work give an account of the manner in which the difficulties caused by the canon laws against usury were avoided, and of certain curious early forms of life insurance. Though the translator has abridged the volume by the omission of many documents inserted in the original, it is evident that this work is the result of much research among the material to be found in the archives of the Italian cities which were the commercial centres of the world during the Middle Ages. It forms an important contribution to the means, not yet very abundant, available for the study of the early commercial law of Europe, of which our English commercial law may in some points be considered a comparatively late outgrowth.

R. G.

HANDBOOK TO THE LABOR LAW OF THE UNITED STATES. By F. J. Stimson. New York: Charles Scribner's Sons. 1896. pp. xxii, 385.

Owing to economic conditions existing in the United States, the last few years have witnessed a remarkably rapid development of our labor law. While the importance of this branch of the law has led several writers to discuss certain of its phases, the need, nevertheless, of a thorough and comprehensive treatise on the general subject must have been felt by every one, lawyer or layman, who has had occasion to give the matter his attention. Mr. F. J. Stimson's Handbook to the Labor Law of the United States, partially at least, supplies this deficiency in our legal literature.

The author states that, while he hopes "the work is sufficiently full and accurate to serve as a legal text-book," yet his "chief object has been to make it a clear and trustworthy guide for laboring men and their several organizations throughout the United States." Judged by this standard, it may fairly be said that he has succeeded admirably, for the book presents just such facts as the wage-earner should be familiar with; and were such a volume in general use among the laboring men, it is believed that they would be induced to resort more often to peaceable and legal remedies for the redress of grievances than to the adoption of forcible and illegal methods. Unquestionably, the legal profession will also find Mr. Stimson's volume of much interest and assistance, although the absence of citations to any but leading cases will prevent its being of great practical value to lawyers.

The Handbook brings the subject down to the summer of 1895, and the author has contented himself, for the most part, with a bare statement of the law, as developed by statutes and court decisions. The first two chapters discuss the labor contract, and in the pages following there are considered such subjects as the political protection and legal privileges of laborers, profit sharing, co-operation, state regulation of industries, rights and liabilities of master and servant, trades unions, remedies by arbitration, etc. In view of recent Federal and State decisions, lawyers will probably find of greatest interest the chapters on strikes and boycotts, equity process and injunctions, and the anti-trust and interstate commerce laws.

H. D. H.

THE LAW OF RAILWAY ACCIDENTS IN MASSACHUSETTS. By G. Hay, Jr. Boston: Little, Brown, & Co. 1897. pp. xviii, 353.

This is one of those highly specialized text-books, covering only a small section of the law in a single State, which are becoming more and more necessary to the practitioner as a guide to the cases. The number of railway accident cases in every State is now enormous, and the number of points coming before the courts for decision, in the process of applying the common law to the complicated conditions of the modern railway business, as well as construing the numerous statutes passed on the subject, is so great that no text-book of wide scope could pretend to mention most of them. Mr. Hay's book covers the whole ground, and gives the substance of all the Massachusetts cases. He has arranged his matter systematically, and put his own general remarks in notes at the ends of the chapters, — a convenient habit.

R. G.



A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP. By J. G. Woerner. Boston: Little, Brown, and Company. 1897. pp. lvi, 580.

Mr. Woerner is the first writer to give the law of the guardianship of minors and lunatics an adequate treatment with reference to the status and relations of the guardian himself. His work is a condensed but complete presentation of legal authorities, written in a simple and monotonous style. The statement of the law is an able one, and the author is a master of his subject. He begins with an historical development of the theory of the guardian, tracing the influences of the Roman law and other systems of law upon the English common law, the statutes, and the practice of the Court of Chancery. The Chancellor in England was the King's representative as the guardian of subjects unable to care for themselves; through him came the jurisdiction of the Chancery Courts. In America, the State took the place of the King; and the chancery jurisdiction has been to a great extent surrendered to the Probate Courts. This has led to the creation of a class of guardians unknown to the English law, general guardians, or, as they are often called, "Probate Court guardians." They have the care of the persons of infants having no natural guardian, or administer their estates when not derived from the acting parent. This system in its details has reached a greater practical efficiency than the English system, and has had the effect of softening the more rigid rules of that system. The author collects and compares American authorities, treating of the care of minors in the first part of the book, and of the care of lunatics in the second part. The book is arranged in available form, and properly indexed. J. G. P.

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THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATIONS.

By Reuben A. Reese, of the Colorado Bar. Chicago: T. H. Flood & Co. 1897. pp. lxxi, 338.

This little book is the first American treatise on the doctrine of Ultra Vires. That doctrine is certainly one of the most important parts of the Law of Corporations, and the part concerning which there has perhaps been the most confusion of opinion among legal authors. Any work treating the subject clearly and consistently is justifiable, though it be an addition to the enormous mass of special treatises on narrow subjects. Mr. Reese appears to have a clear and consistent view of the doctrine; and he has quoted the authorities with great completeness. The volume is well arranged and contains an ample index. R. G.

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AMERICAN NEGLIGENCE REPORTS. Edited by John M. Gardner, of the New York Bar. Vol. I. Nos. 162. New York: Remick and Schelling. 1897. pp. xl, 202.

These reports contain a summary of all current cases on negligence, the more important decisions being given in full. The arrangement of the cases is convenient for reference; and there are two complete indices, one in the ordinary form, the other classifying each case according to its subject matter. To a specialist these reports will be of importance. Negligence is a subject arbitrary in its special subdivisions; in it, more than in most branches of the law, is the general lawyer forced to consider special applications of legal principles; and in so doing he will find these reports of service to him. J. G. P.

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## DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875.

### PART I.

DISCOVERY is in law the compulsory disclosure by a litigant of such facts within his knowledge, and of the contents of such documents in his possession, as will aid his adversary in proving his case or defence. The disclosure is made by a statement in writing, signed and sworn to, of the facts required to be disclosed, and by an actual production of the documents. The statement in writing must also specify what documents, if any, the litigant has in his possession, the contents of which will aid his adversary in proving his case or defence; for it is only of documents so specified that production can be compelled. The reason for requiring the statement in writing to be sworn to is peculiar. The reason, or at least the principal reason, for requiring the statements of a witness to be made under oath is the security which an oath is supposed to furnish that the witness will not state *more* than is true, *i. e.*, what is untrue; but in the case of discovery the *sole* reason is the security which an oath is supposed to furnish that the litigant giving the discovery will not state *less* than is true, *i. e.*, deny what is true. In the case of a witness, the danger chiefly to be guarded against is, that he will endeavor to serve the party by whom he is called, and to injure the adverse party, by stating more than the truth warrants; and, as there is no good reason why the security of an oath should not be given, the law



makes the oath of a witness indispensable to the admissibility of his testimony. In the case of a litigant giving discovery, however, it is not possible for him to serve himself (except indirectly), for his statements are under no circumstances evidence in his own favor; and therefore the law has no occasion to guard against his stating in his own favor more than is true. Still less occasion has the law to guard against his stating more than the truth in favor of his adversary, his own interest being an abundant protection against that. There is, therefore, no reason why the admissibility in evidence of a statement by way of discovery should be at all dependent upon its being under oath, for in no event is it admissible as evidence except as against the party making it, and it is admissible as against him, not because it is under oath, but because it is an admission against his own interest. There is, however, great danger that a party giving discovery will deny, or at least evade admitting, what is true in favor of his adversary; and it is to guard against this danger that he is required to give his discovery under oath, so that he may be compelled to accept the alternative of admitting, what is true, or that of incurring the pains and penalties of perjury. Statements, therefore, by way of discovery are required to be made under oath, not because an oath affects their admissibility as evidence, or even their credibility, but because, being against the interest of the party making them, they are supposed to be made only by compulsion, and an oath furnishes the only effective means of compulsion known to the law; for it would be idle to compel a litigant to say whether such and such things are not true, if he could with impunity deny them to be true, though he knew to the contrary. Upon the whole, therefore, while an oath is required, in the case of a witness, chiefly in the interest of the party against whom he is called, it is required of a party giving discovery solely in the interest of the party seeking the discovery.

It is scarcely necessary to say that discovery is not an original product of English soil, and that the common law has ever been a total stranger to it. Its name, indeed, is English, but the thing itself is entirely foreign. It was borrowed by the Court of Chancery, directly from the English ecclesiastical courts, — indirectly from the civil and canon law. Until about the middle of the present century, when full power to compel discovery was conferred by statute upon the common-law courts, the Court of Chancery enforced discovery for the benefit, as well of suitors in the common-law courts, as of its own suitors. From the date last mentioned, however, to

the time when the Judicature Acts came into operation, each of the three common-law courts, as well as each of the several branches of the Court of Chancery, enforced discovery for the benefit of its own suitors. Prior to the Judicature Acts, therefore, discovery was administered in England under three different systems of procedure, namely, that of the ecclesiastical courts, that of the Court of Chancery, and that of the common law. Perhaps it would be better to say it was administered under three different systems of pleading, as pleading is the only important branch of procedure with which discovery has much connection. With pleading, however, discovery has so intimate a connection that it is impossible to deal with it intelligently without an intelligent understanding of the system of pleading under which it is administered. It is proper, therefore, to point out the more important features of each of the three systems of pleading just referred to, so that it may be seen, not only what is the nature of each, but wherein each of them differs in any important particulars from either or both of the others,—particularly, wherein that of the ecclesiastical courts differs from that of the common law; for that of the Court of Chancery scarcely has an important feature which was not borrowed from one of the other two. In respect to the system of the ecclesiastical courts, however, it should be observed that, while it is in substance that of the civil and canon law, pure and simple, yet it has one or two peculiarities of form which tend to conceal its true nature; and it will, therefore, be convenient to compare the other two systems with that of the civil and canon law generally, leaving the slight modifications which the latter system has undergone in the English ecclesiastical courts to be afterwards pointed out.

The most radical difference between the common-law system of pleading and that of the civil and canon law will be found in the fact that, in the latter system, all the pleadings are affirmative. This will strike a common-law lawyer as anomalous, but in truth it is the converse fact, that common-law pleadings are negative as well as affirmative, that is anomalous. This is shown by the fact that the existence of negative pleadings in the common-law system is due entirely to the existence in that system of a positive and arbitrary rule, namely, that every allegation in any pleading upon which a traverse can be properly taken<sup>1</sup> shall be considered as

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<sup>1</sup> See *infra*, p. 149, n. 1.



admitted by the adverse party to be true, unless he traverse it. But for this rule, every fact alleged in an affirmative pleading must, in order to be available, have been proved, whether it was traversed by the adverse party or not; and hence neither party would have had any occasion to plead negatively.

To say, therefore, that there were no negative pleadings in the civil and canon law is only to say that there was nothing in that law to render negative pleadings necessary. When, therefore, a plaintiff had stated his case in a pleading, the question for the defendant to consider was whether he had an affirmative defence. If he had, he would plead it; if he had not, he would not plead at all, and the plaintiff would recover on proving the facts alleged in his pleading, provided such pleading was good in law. If the defendant pleaded an affirmative defence, the plaintiff must then consider whether he had facts which would support an affirmative replication. If he had, he would plead such facts; if he had not, the pleadings would end with the defendant's affirmative defence. In this way, the pleadings continued until the facts were exhausted, *i. e.*, until it appeared that the party whose turn it was to plead had nothing further to allege.

In respect to the facts necessary to support them, pleadings in the civil and canon law did not differ materially from affirmative pleadings at common law, but in respect to the mode of stating those facts they differed widely; and this was because of another positive rule of the common law, namely, that facts must be stated, not as they actually existed, but according to their legal effect and operation. Even this rule, however, existed for the sake of the more general rule already stated; for, as each party was required either to traverse or to admit to be true the statements made in his adversary's pleadings, so he was entitled in turn to have those statements so made that a traverse could be taken upon them which would form a good issue.

In the mode of conducting the pleadings, the civil and canon law differed widely from the common law. At common law, the pleadings were conducted out of court by the respective attorneys, pursuant to established rules, the court not even knowing that an action was pending, unless its authority was invoked by one of the parties, either in his own favor or against the adverse party. In the civil and canon law, on the other hand, the conduct of the pleadings was under the constant superintendence and control of the court. Every pleading had to be brought into the registry of the

court, and filed by the registrar, and, until so filed, it had in law no existence; and yet it could not be filed without either the consent of the adverse party or the order of the court; and of course the court would not order a pleading to be filed without first hearing any objections raised to it by the adverse party. If objections were raised, they were either overruled or allowed. If overruled, the pleading was received; if allowed, the pleading was either rejected, and so went for nothing, or it was so amended as to remove the objections.<sup>1</sup> This proceeding, therefore, bore some

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<sup>1</sup> The difference between the two systems stated in the text did not, however, always exist; for originally the conduct of the pleadings at common law appears to have been subject to the superintendence and control of the court, even to a greater degree than in the civil and canon law. Another difference, however, did always exist, namely, that, while in the civil and canon law the pleadings were always in writing, at common law they were always oral, in legal contemplation, until they were embodied in a parchment record. This is sufficiently proved by the records themselves, which are always in the present tense, and purport upon their face to be a strictly contemporaneous account of what was said and done in open court. That pleadings were originally oral is admitted on all hands; but it is commonly said that they ceased to be so about the middle of the reign of Edward III. It has also been commonly supposed that, so long as pleadings were oral, the act of recording them was in fact (as it always was in theory) strictly contemporaneous with the oral statement of them, *i. e.*, that a pleading was transferred by an officer of the court directly from the mouth of the pleader to the parchment roll. A very little reflection, however, will show that the act of stating a pleading orally, and the act of recording it, could never have been contemporaneous. It would not, indeed, be rational to suppose that the practice ever existed of stating pleadings orally (still less that of taking them down) in the very terms in which they were afterwards recorded. On the contrary, the rational supposition is that the oral statement was designed merely to inform the court and its officers and the adverse party what the pleading would be when formally drawn up and recorded, and that the officer of the court whose duty it was to make up the record merely took down such a minute of what was said as would enable him to perform that duty. Moreover, while both the oral statement and the minute of it were in French, the *récord* was in Latin.

How then did this ancient practice differ from that which existed, for example, during the first quarter of the present century? Simply in this, namely, that, in the latter period, the oral statement of the pleadings in open court, and the minuting of them by an officer of the court, had ceased, and the pleadings were instead drawn up on paper by the attorneys of the respective parties (or by their procurement) in the precise form in which they were afterwards to be recorded, and a copy delivered to the attorney of the adverse party; and when the pleadings were finished the record was made up by the plaintiff's attorney, and carried into the proper office, where it was filed. The paper pleadings were, therefore, like the ancient official minute, mere memoranda from which the parchment record was to be made up, and when the latter was made up and filed the former were entirely superseded, and it was as if they had never existed. This explains the fact that the several paper pleadings were on their face incomplete documents, and were not signed by the attorney by whom, or by whose procurement, they were respectively drawn, being in fact mere segments of the future record.

It will be seen, therefore, that the change from the ancient to the modern practice was a change in the mode of conducting the pleadings, — not a change in the pleadings



resemblance to a demurrer at common law, though such resemblance was in truth less than at first sight it appears to have been. Upon the proceeding in question, there were no facts before the court; the facts stated in the pleading were simply assumed to exist; and, though a court can decide negatively that a certain legal conclusion does not follow from an assumed state of facts, it cannot decide affirmatively that such conclusion does follow; for the latter purpose, the facts must first be established. Therefore, while a decision against a pleading caused its final rejection, a decision in its favor was merely to the effect that it should be received as a pleading in the cause, and that the adverse party must therefore answer it at his peril.

As by the civil and canon law every successive pleading had to be proved, without any reference to the pleadings which followed it, and as all proof (other than documentary proof) had to be taken in writing and before the hearing of the cause, it followed that proof of each successive pleading might be taken before any further pleading was filed, or the taking of proofs might be postponed until the pleadings were concluded, and the proofs might then be taken as to all the pleadings together. So far as the proofs consisted of the testimony of witnesses, it is impossible to say, *a priori*, which of these plans would be found most convenient in any given case. So far, however, as they consisted of discovery, there is no doubt whatever which is the better plan; for discovery ought always to be had at the earliest practicable moment, and in particular it ought always to be had before witnesses are examined. It ought to be had at the earliest practicable moment, first, because the parties may die, and then their knowledge will die with them; secondly, because frequently a party cannot know, until discovery is had, how the subsequent prosecution or defence of the suit should be conducted, or even whether the further prosecution or defence of the suit should be persisted in. It should be had before witnesses are examined, first, because proof by means of discovery is less expensive by far than that by the testimony of witnesses; secondly, because proof by discovery is, so far as it goes, conclusive against the

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themselves, nor from oral to written pleadings. A change of the latter kind would have involved an abandonment, or an entire reconstruction, of the ancient common-law record, and, to a considerable extent, a reconstruction of the system of pleading itself. In particular, each pleading must have been made a complete document in itself, and, instead of a copy of it being delivered to the attorney of the adverse party, it must (like pleadings in Chancery) have been engrossed upon parchment and filed.

adverse party, whereas the testimony of witnesses is liable to be contradicted or not to be believed; thirdly, because discovery is the only compulsory means afforded by the civil and canon law of eliminating from a cause those facts about which there is no real dispute. The parties must of course respectively allege and prove every fact necessary to make out their respective case or defence; and yet nine-tenths of those facts the parties respectively may know to be true, while it may be difficult, or even impossible, to prove them all by witnesses. All such facts, therefore, should be proved by means of discovery, and thus eliminated from the controversy. Then the testimony of witnesses will be limited to its proper office, namely, the proof of matters actually in controversy. Accordingly, the course was to require the answer upon oath of the adverse party, as to the facts alleged in any pleading, to be made as soon as the latter was filed.

The next question is how the answers of parties upon oath were obtained. As the answers were in writing, one might naturally infer that they would be obtained by means of written interrogatories, prepared by the counsel of the adverse party, and either delivered to the party who was to answer them, or filed in the registry. In fact, however, a party was never permitted to interrogate the adverse party, either in writing or orally. How, then, were the answers of the latter obtained? It is conceivable that he should be required to answer the pleading itself, *i. e.*, to say whether the statements contained in it were or were not true; and this is what actually takes place in the English ecclesiastical courts; but in the civil and canon law such a course would have been open to this objection, namely, that, as by that law a pleading contained only the facts sought to be established, and not the evidence by which they were to be established, the adverse party would frequently deny the existence of the facts alleged, though he could not deny the existence of the evidence upon the strength of which the facts were alleged to exist; and therefore, if a party had been required, by way of discovery, only to answer the pleadings of the adverse party, the latter would not have obtained that benefit from the discovery to which he was entitled. To obviate this difficulty, each party, on filing a pleading, also prepared and filed another document containing so much of the evidence in support of the facts alleged in the pleading as he supposed to be within the knowledge of the adverse party, and this document the latter was required to answer. It was divided into numbered paragraphs, and each paragraph was



called a "position" (*positio*), while the document as a whole was called "positions." Each position had to be answered categorically and in its precise terms, just as an interrogatory addressed to a witness on cross-examination has to be answered.

It is proper also to state that still another document was prepared and filed, containing so much of the evidence in support of the facts alleged in the pleading as was expected to be established by the testimony of witnesses; and upon this document the party examined his witnesses. It was, like the preceding, divided into numbered paragraphs; but each paragraph was called an "article" (*articulus*), while the document as a whole was called "articles."

It must not be supposed, however, that positions and articles were always supplemental to a pleading; for positions had to be filed as often as discovery was wanted, and articles had to be filed as often as witnesses were to be examined. Wherever, therefore, a party sought discovery from the adverse party, or desired to examine witnesses, for the purpose of disproving facts alleged in a pleading by his adversary, it was necessary for him to file positions or articles, as the case might be; and yet there could be no affirmative pleading in such a case, as there were no *facts* to be alleged. In short, while there were no negative pleadings in the civil and canon law, either party might of course have a negative case to support in point of proof. Indeed, so often as a fact alleged by one party in pleading is controverted by the other, each of them has a case to support in point of proof, that of the former being affirmative, and that of the latter negative.

Interrogatories were used for one purpose only, namely, that of the cross-examination by each party of the witnesses of the adverse party. These, as well as the depositions of the witnesses, both on the direct and on the cross-examination, were kept secret until publication took place, and that was not till the examination and cross-examination of witnesses were concluded.

It has been already observed that, in the English ecclesiastical courts, answers by way of discovery are to the pleadings themselves; and the reason of that is, that in those courts there is no distinction between pleadings on the one hand, and positions and articles on the other, the three being consolidated and comprised in one document, — which is drawn in numbered paragraphs, and resembles positions and articles much more than it does a pleading proper; and this is the peculiarity in the pleadings of those

courts which is adverted to on a previous page.<sup>1</sup> A consequence of this is, that in those courts where a party has an affirmative case of his own to state, and also controverts the case stated in the previous pleading of his adversary (*i. e.*, has both an affirmative and a negative case in respect to proof), the pleading filed by him will comprise, not only his affirmative case and the evidence in support of it, but also the evidence in support of his negative case. Another consequence is, that in those courts, whenever a party either seeks discovery or wishes to examine witnesses, he must file a pleading, though he have no affirmative case to state; and, therefore, a pleading may consist of positions and articles alone, or of positions alone, or of articles alone. Moreover, a pleading never indicates at all by its form how many or what different elements it contains.

The administration of discovery in the ecclesiastical courts is instructive in several points of view. What chiefly strikes one is the fact that the administration of discovery in those courts has given rise to none of those troublesome and difficult questions which have so eminently characterized it in the Court of Chancery, in the common-law courts, and under the Judicature Acts.

I. The ecclesiastical courts never had occasion even to formulate the rule that no litigant is entitled to make use of the machinery of discovery for the purpose of prying into his adversary's case. There were two reasons for this, namely, first, that the use of positions, instead of interrogatories, made such a perversion of discovery impracticable; secondly, that a litigant was under little temptation to pry into his adversary's case, even if it had been practicable for him to do so; for, first, the use of positions made it necessary for a party seeking discovery to state affirmatively and in precise terms what he wished the adverse party to admit to be true, and the latter was required to swear only in the very terms of the position; and this would not at all serve the purposes of one who was seeking to pry into his adversary's case, for such an one is seeking to learn what he does not know, and is unable to imagine. Secondly, the ecclesiastical procedure did not regard a litigation as a game, either of skill or chance, but as a means of ascertaining truth and administering justice, and hence it furnished each litigant with the means of knowing beforehand precisely what evidence might be adduced against him, so that he should have plenty of time to prepare

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<sup>1</sup> See *supra*, p. 139.



himself to meet it, and not be taken by surprise. Thus, the articles filed by each party disclosed fully, as has been seen, what he proposed to prove by the testimony of witnesses, and any testimony which was extra-articulate was liable to be suppressed; and each party was further required to produce each of his witnesses, before examining him, to the adverse party, and to inform the latter upon which of the articles each witness was to be examined. It is true, the depositions of witnesses were kept secret till publication passed, but then they were kept secret from both parties alike, and that was done solely from considerations of policy, namely, to prevent perjury and subornation of perjury. Then, as to documentary evidence, still greater security was provided that neither party should be taken by surprise; for each party was required, not only to describe fully, in a separate article, every document which he was to use as evidence, but also to annex to the articles the document itself, or a copy of it, if the original could not be had, or, if the original document was already in the registry of the court, then to refer to it as being there.

II. For the same reasons, no attempt was ever made in the ecclesiastical courts to use the machinery of discovery to supply defects in pleadings, *i. e.*, as a means of obtaining information which the pleadings of one party ought to furnish to the other, but did not.

III. For the first of the above reasons, namely, the necessity of using positions, no attempt was ever made in the ecclesiastical courts to obtain discovery before pleading, and to enable a party to draw his pleading.

IV. The necessity of extracting discovery by means of positions instead of interrogatories effectively prevented the vice of "fishing."

V. The practice which existed in the Court of Chancery of requiring an account by way of discovery was entirely unknown in the ecclesiastical courts. As the existence of such a practice in the Court of Chancery cannot be accounted for on any rational ground, it seems unnecessary to account for its non-existence in the ecclesiastical courts.

VI. The discovery and production of documents never made much figure in the ecclesiastical courts; and the reason of this must have been that such discovery and production were not often found necessary in those courts. One class of suits was, however, exceptional in this respect, namely, suits for the probate of

wills; and this was particularly true before the Wills Act,<sup>1</sup> when one or more documents of the most informal character might constitute a will of personal estate. Accordingly, in all such suits each party was required, at the proper time, to make, and file in the registry, an affidavit (called an affidavit of scripts), specifying all writings of a testamentary nature in his possession, or within his knowledge, and either to annex the same to his affidavit, or account for his not doing so; and if an affidavit was filed which was not sufficiently full, or sufficiently explicit, a further and better affidavit would be required. It will be seen, therefore, that the discovery of documents was an exception to the rule which required a party seeking discovery to state in a position what he claimed to be true, before he could call upon the adverse party to say upon his oath whether it was not true.

VII. There was no confusion in the ecclesiastical courts between discovery and relief; and therefore a party never sought in those courts to obtain a relief under the pretence of obtaining discovery, — a thing which often happened in the Court of Chancery.

VIII. In the ecclesiastical courts, a party could never refuse to answer by way of discovery, on the ground that the pleading, for the proof of which the discovery was sought, was bad in law, and hence proof of it would be useless; for in that case he should have procured the pleading to be rejected, and then no question as to the proof of it would have arisen.

IX. In the ecclesiastical courts a party could never refuse to answer by way of discovery, on the ground that he had a good affirmative answer to the pleading for the proof of which the discovery was sought, and hence that the discovery would be unnecessary and useless; for in those courts it was not till a pleading had been proved that the question could be raised whether the adverse party had an affirmative answer to it or not. Even at common law, the only reason why an affirmative pleading made it unnecessary to prove the pleading to which it was an answer was, that the former operated as a constructive admission of the truth of the latter; though even that was not strictly true, as it was not the affirmative pleading, but the absence of a negative pleading, that caused the constructive admission.

Lastly. The burden of answering positions imposed upon suitors in the ecclesiastical courts was no greater than that imposed

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<sup>1</sup> 7 Wm. IV. & 1 Vict., c. 26.



upon witnesses of answering articles; and therefore there was never any ground for saying of discovery as administered in those courts (what English judges have often said of discovery as administered in the Court of Chancery), that it was cruel and oppressive.

Turning now from the ecclesiastical courts, we proceed to consider briefly the nature of the common-law system of pleading. Certain features of that system have, indeed, already been adverted to; but that was merely for the purpose of bringing out more clearly the nature and working of the civil and canon law system. The common-law system was supposed to form, in the minds of most readers, the standard with which any other system would be compared; and therefore the more familiar system was used as a means of explaining that which was less familiar. As between the common-law system, however, and that of the civil and canon law, it is the latter that constitutes the true standard, as the former is an offshoot from the latter; and yet it would be a great mistake to suppose that the latter will furnish the key with which to unlock the secrets of the former; for, while the latter is a natural, and therefore a simple system, the former is highly artificial and technical. While, therefore, the civil and canon law system of pleading should be the starting point of any inquiry into the essential nature of the common-law system, the chief object of such an inquiry should be to ascertain why two systems, between which there existed the relation of parent and child, differed from each other so radically. What was the cause of so remarkable a phenomenon? The answer may be summed up in three words, namely, trial by jury.

In the civil and canon law, all the questions in a cause were decided by a judge, and hence there was no necessity for making any sharp distinction between questions of law and questions of fact. In the common law, on the other hand, all the controverted facts in a cause upon which the ultimate rights of the parties depended had to be ascertained by the verdict of a jury; and before that could be done it was necessary, first, to ascertain whether there were any facts in controversy, and if there were, secondly, to put the case in a fit state for the trial of such facts by a jury; and, whether a trial by jury was found to be necessary in a given cause or not, it was necessary, thirdly, to put the cause in a fit state to receive the judgment of the court, and, to do that, it was necessary that all the facts involved in a cause should be established, namely, either by the admissions of the parties or by the

verdict of a jury. Moreover, all these three objects were sought to be accomplished by means of the pleadings alone; and accordingly certain rules of pleading were established with a view to their accomplishment. The first of these rules was the one heretofore adverted to, namely, that all the material and issuable<sup>1</sup> facts alleged in any pleading shall be considered as admitted by the adverse party to be true, unless he expressly deny them. Suppose then, in a given case, each of the parties in turn pleads affirmatively, as he would do in the civil and canon law, until the facts are exhausted, and then the pleadings cease. The result will be that all the material and issuable facts alleged on either side will be admitted to be true, and it will only remain for the court to pronounce the judgment of the law upon those admitted facts. Again, suppose that, at some stage of the pleading, the party whose turn it is to plead, instead of pleading affirmatively, traverses some material and issuable fact alleged in the last pleading of his adversary. The result will then be that all the material and issuable facts alleged on either side will be admitted to be true except the one fact traversed, and that will have to be tried by a jury; but when it is so tried, the case will be ready for the judgment of the court. So far, therefore, every object is perfectly accomplished by the operation of the rule in question. Suppose, however, at some stage of the pleading, the party whose turn it is to plead insists upon traversing every material and issuable fact alleged in the last pleading of his adversary, and also upon pleading one or more affirmative pleas. It is clear that the rule in question would not prevent his doing so, and yet to permit him to do so would be to permit that rule to be nullified at the will of either party; for the sole object of the rule was to procure admissions by one party of facts alleged by the adverse party. Moreover, it could not be assumed that such admissions would ever be

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<sup>1</sup> An issuable or traversable fact is one upon the truth of which the right of action depends, and upon the traverse of which, therefore, a good issue will arise, *i. e.*, an issue which (the other necessary facts being admitted) will decide the action. A material fact which is not issuable (and therefore not traversable) is one the truth of which is not necessary to the maintenance of the action, but the truth of which will affect the amount which the plaintiff will be entitled to recover. As such a fact cannot be traversed, of course a failure to traverse it will not be a constructive admission of its truth. It is for this reason that the plaintiff, in an action which sounds in damages, always has to prove his damages, and have them assessed by a jury, whether the defendant has traversed the declaration, or pleaded to it affirmatively, or demurred to it, or has not pleaded to it at all.



voluntarily given, and therefore the rule must have contemplated some kind of compulsion.

We must therefore suppose that the rule in question did not stand alone, but that it was protected by some other rule or rules which prevented its operation from being defeated. Accordingly, we find that it was an established rule that pleadings should not be double. Thus, a plaintiff might have a cause of action which could be rested upon several grounds of fact, but yet he could state one ground only, even though he should lose his case in consequence. So a defendant might have a negative defence, and also an affirmative defence, or two or more negative defences, or two or more affirmative defences; but yet he could avail himself of only one of them, even though he should be defeated in consequence. And so it was as to all subsequent pleadings. Accordingly, in the case last supposed, the party must plead either affirmatively or negatively, and not both affirmatively and negatively, and he could plead only one plea of either kind. If it be asked whether trial by jury made so much rigor necessary, and in particular whether, as every affirmative pleading was required to be single, a traverse might not have been permitted to extend to the entire pleading to which it was pleaded, instead of being limited to a single fact,<sup>1</sup> it will be sufficient to answer that those by whom the common-law system of pleading was established and built up would have said, "No"; for it was with them a cardinal doctrine that trial by jury made it necessary that the controversy should be reduced to a single point (called an issue); and, indeed, the notion that every controversy must by pleading be reduced to a single point became so deeply rooted in the minds of common-law lawyers, that they supposed it must be the chief object of every system of pleading to bring about that result.

It must, however, be admitted that the rule requiring every traverse to be limited to one material and issuable fact was, apparently from the beginning, subject to certain exceptions. The most important of these had their origin in that form of traverse known as the general issue, and which, while it was always negative in its terms, and always operated directly as a traverse, yet frequently did not traverse any fact alleged in the declaration, but traversed instead some conclusion deducible, either from all the facts alleged in the declaration, or at least from two or more of those facts.

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<sup>1</sup> But see *Robinson v. Raley*, 1 Burr. 316; *Rowles v. Lusty*, 4 Bing. 428.

Thus, the general issue in the action of trespass was "not guilty"; and accordingly, when that action was brought for a trespass to property, the plea of the general issue operated as a denial both that the plaintiff committed the acts complained of, and also that the property to which those acts were alleged to have been committed was the plaintiff's property. So, in the action of debt on simple contract, the general issue was *nil debet*; and under it, therefore, a defendant could not only put the plaintiff to the proof of everything alleged in the declaration, but could also himself prove any affirmative defence which showed that he was not indebted to the plaintiff, as alleged in the declaration, at the time when the action was brought. Had this action, therefore, continued to be the remedy for the recovery of all simple contract debts (instead of going out of use, as it did, at an early day, on account of the defendant's ability to wage his law), it would have exerted a momentous influence upon the fortunes of common-law pleading, as it would virtually have put an end to all pleadings subsequent to the declaration in a class of actions which greatly exceeded in number all other actions put together.

Another exception to the rule that a traverse must be limited to some one material and issuable fact was made by the form of traverse known as the replication *de injuria sua propria absque tali causa*; for this had the effect of traversing the entire plea to which it was pleaded, and so virtually of putting an end to all pleadings subsequent to the defendant's plea. It was, however, available in only a limited number of cases.

There were, moreover, two actions, both of comparatively late origin, and both of great practical importance, in which the pleadings not only ended virtually with the declaration in nearly every case, but in which the declaration itself was reduced to a minimum, namely, the action on the case and the action of ejectment.

The action on the case had its origin, as is well known, in the Statute of Westminster 2 (13 Edw. I., c. 24). No one could have anticipated that this action was destined to have so disastrous an effect upon the common-law system of pleading; for, in its origin, it differed from the action of trespass (in analogy to which it was framed) in having no prescribed form, and in being based upon the special facts and circumstances of each case, and it was hence called a special action on the case. Accordingly, the declaration in it was much longer, and much more special, than the declaration in trespass, and its general issue was the same, namely, not guilty.



Indeed, it is not with this action in its original form, but with the singular uses to which it was afterwards applied, that we now have chiefly to do; for it was at length employed (under the name of *assumpsit*) for the enforcement of all simple contracts which did not create debts, the excuse being that none of the older actions would lie upon such contracts; and thus an action of tort was converted into an action of contract. At a still later date, as the defendant could wage his law in an action of debt on simple contract, a necessity was felt for providing some other remedy for the recovery of simple contract debts; and accordingly the courts declared that, wherever there existed a simple contract debt, the law would imply a promise to pay it, and therefore an action of *assumpsit* would lie to recover it;<sup>1</sup> and thus *assumpsit* (i. e. *indebitatus assumpsit*) became the universal remedy for the recovery of simple contract debts. Moreover, it was this latest form of the action of *assumpsit* that exerted the extraordinary influence upon pleading which we are now considering. In fact, it exerted the same influence that would have been exerted by the action which it superseded, namely, debt on simple contract, if that action had maintained its ground; but it is important to observe that it exerted that influence by entirely different means, i. e., not by the plea of the general issue, but by the declaration.

When the action of *assumpsit* was formed from the action on the case, the declaration still retained the semblance of a declaration in tort; for, while it set forth the contract which was the foundation of the action, yet it did so only by way of recital or inducement, and it treated the breach of the contract as a tort, and as the real foundation of the action; and it is not therefore very obvious why the old general issue of not guilty was not retained. Instead of that, however, a new general issue was framed (*non assumpsit*), which not only assumed the action to be founded on contract, but also conformed to the strictest rules governing traverses by traversing directly the making of the contract. When, however, *indebitatus assumpsit* came into use, the fictitious implied promise, though in truth a mere form, was declared upon as if it were an actual promise and hence it usurped the place in the declaration which belonged to the actual contract which created the debt; and, though the existence of the debt had to be stated, it was in fact stated only as the consideration for the fictitious promise, and there was only a

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<sup>1</sup> See *Slade's Case*, 4 Rep. 92 b.

bare allusion to the contract which created the debt, merely by way of indicating the nature of the transaction<sup>1</sup> in which the debt had its origin. Such was the *indebitatus* count in *assumpsit*; and of course a consequence of it was that the general issue of *non assumpsit* (through no fault of its own) not only operated as a traverse of the entire declaration, but also let in every affirmative defence which showed that no debt existed when the action was brought; for if there was no debt, there was no promise.

Moreover, the general issue of *non assumpsit* having in this indirect way acquired so extensive an operation when pleaded to an *indebitatus* count, the same extent of operation was, by a strange perversity, at length given to it when pleaded to a special count, and even to the general issue of not guilty in the action on the case proper. These two abuses were, however, corrected by the Rules of Hilary Term, 1834, which reduced the operation of the general issue in both cases to its true limits, — unless, indeed, the limits fixed were somewhat too narrow. But unfortunately those rules dealt in the same way with *indebitatus assumpsit*, leaving the *indebitatus* count (which was the true source of the mischief) unchanged, and declaring in effect that the general issue of *non assumpsit* should operate only as a traverse of the declaration, and should not, therefore, let in any affirmative defence. They therefore presented an erroneous view, not only of the source of the mischief, but also of the true operation of the general issue of *non assumpsit*, when pleaded to an *indebitatus* count. Perhaps it was found easier to limit arbitrarily the operation of the general issue than to provide a substitute for the *indebitatus* counts.

The action of ejectment exerted the same kind of influence upon common-law pleading as the action on the case but in a very different way. First, it rendered practically obsolete all the ancient actions for the recovery of land; secondly, it was originally brought by an actual lessee for years against some third person who had ejected the plaintiff from his term; but, the lease having been made for the sole purpose of trying the lessor's power to make it, *i. e.*, his title to the land, it followed that the pleadings (which of course related merely to the lease) had no relation whatever to the question to be tried, namely, the lessor's title to the land. It is unnecessary, therefore, to pursue the subsequent history of the action; for, even in its original form, and before any fictions were

<sup>1</sup> *E.g.*, money paid, money lent, money had and received, goods bargained and sold, goods sold and delivered, work and labor.



introduced into it, it is plain that there were practically no pleadings whatever, and that all such actions had to be tried, therefore, without any aid from pleadings. Moreover, no change was made in this respect prior to the Judicature Acts.<sup>1</sup>

There is still another mode in which the rigor of the common-law system of pleading was from time to time relaxed, namely, by statute. First, by 4 & 5 Anne, c. 16, s. 4, it was declared that it should be lawful for any defendant, with leave of the court, to plead as many several matters as he should think necessary for his defence. Secondly, by the Common Law Procedure Act, 1852, s. 81, the privilege, which was limited by the statute of Anne to the defendant's plea, was extended to all subsequent pleadings on both sides. Under these statutes, everything depended upon the manner in which the court exercised the discretion with which it was intrusted; and, in respect to the subject now under consideration, the important question is, to what extent a defendant was permitted to traverse several matters in the declaration, or to traverse one or several matters, notwithstanding he also pleaded affirmatively. On these points, however, it is impossible to speak with certainty, as the temper (and therefore the practice) of the courts changed from time to time.<sup>2</sup> Thirdly, by the Common Law Pro-

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<sup>1</sup> See Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76), s. 178.

<sup>2</sup> In the much litigated case of *Gully v. Bishop of Exeter*, 4 Bing. 525, 5 Bing. 42 (1826, 1827, and 1828), which was a *quare impedit*, and in which the plaintiff was obliged to trace his title through a period of two hundred years, the defendant (having obtained a rule to plead several matters) pleaded forty-three pleas, traversing every allegation in the declaration, though the plaintiff's claim rested solely on the validity of a deed of 1672, which the defendant sought to invalidate by setting up a subsequent deed of 1692. The plaintiff replied, the cause came on for trial, and the plaintiff was nonsuited; but the nonsuit was afterwards set aside, and a new trial granted. The plaintiff then made an application to the court to rescind the rule to plead several matters, which application was granted, on the ground that an improper use had been made of the rule. The defendant's counsel, in resisting the application, said (4 Bing. 536): "With the exception of four, all the pleas raised issues on allegations in the declaration, which the court could not refuse to the defendant the privilege of disputing; and the court had repeatedly refused to strike out pleas unless a clear case of vexation were made out."

The defendant then obtained a new rule *nisi* to plead sixteen specified pleas; the plaintiff's counsel showed cause against making the rule absolute, and the defendant's counsel, in supporting the rule, said (5 Bing. 43): "It has always been the practice of the court to permit the defendant to take issue on every matter of fact advanced by the plaintiff, and to hold him, like the prosecutor in criminal proceedings, to the strict proof of his title. . . . In the plaintiff's case there are two points: 1. the allegation of his title; 2. the disturbance by the defendants: but the disturbance being admitted, the defendants may apply themselves exclusively to the title, and if that title consists of an allega-

cedure Act, 1852, s. 84, any defendant was authorized, without the leave of court, to plead any two or more of the pleas therein enumerated, and two of the pleas thus enumerated were a plea denying a contract or debt alleged in the declaration, and the plea of not guilty. Fourthly, by the Common Law Procedure Act, 1852, ss. 77, 78, any plaintiff was authorized, without leave of court, to traverse the whole of any plea or subsequent pleading of the defendant, and any defendant was authorized to traverse the whole of any replication or subsequent pleading of the plaintiff.

It will be seen, therefore, that after the Common Law Procedure Act, 1852, very little remained of that once vital principle of common-law pleading, by which every controversy was reduced to a single issue, namely, the principle of compulsory admissions; for (1) the declaration was the only pleading the whole of which could not always be traversed by the adverse party as of right, and without the sacrifice of any other right; (2) in the great majority of cases (namely, in all cases in which an *indebitatus* count was used as well as in many other cases) the whole declaration could be traversed by pleading the general issue; (3) in all other cases, the whole declaration could be traversed with leave of the court; and (4) in ejectment, as has been seen, there were no pleadings, and therefore nothing to traverse.

Before leaving the subject of common-law pleading, it may be well to call attention to one or two points by which its kinship to the system of the civil and canon law appears.

I. It is a rule that every series of common-law pleadings must terminate either in a demurrer or in a traverse, while in the civil and canon law, as has been seen, the termination of pleadings is

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tion of many facts, may traverse them all." Burrough, J., said (p. 46): "I am happy at this opportunity of giving a death blow to a practice which has improperly prevailed for many years, and which I have long discountenanced. If in this case the deed of 1672 be set aside, all the other issues fall to the ground. As to the practice of the court, it cannot repeal the statute of Anne, and by that statute we are bound to exercise a discretion in the permission we grant to parties to plead several matters." Gaselee, J., said (p. 47): "The statute of Anne would never have been passed if such abuses had been anticipated as have taken place. The existing practice has given a defendant a most inconvenient advantage over a plaintiff. . . . The true principle of pleading several matters is, that if the justice of the case requires that a party should allege several defences, the court will not prevent it; but they will not allow a party to plead, merely for the purpose of throwing difficulties in the way of his opponent. . . . The defendant shall be put to elect which link of the plaintiff's title he will contest; and if he contests the deed of 1672, he may plead *non concessit*, and that the deed was fraudulent." Accordingly, the rule was discharged as to all the sixteen pleas except the two mentioned by Gaselee, J.



not marked by any affirmative act, but they simply cease when the party whose turn it is to plead fails to do so. This difference, however, may be easily explained. The first of the two common-law modes of terminating pleadings, namely, by demurrer, is in substance that of the civil and canon law, for a demurrer is only a form; it really amounts only to a statement on the record, by the party whose turn it is to plead, that he declines to do so, and demands the judgment of the court on the pleadings as they stand; and the use of this form is sufficiently accounted for by the fact that, at common law, in the absence of any traverse, all the facts stand admitted, and the case is therefore ready for the judgment of the court, whereas, in the civil and canon law, all the facts remain to be proved. On the other hand, the second mode of closing the pleadings at common law, namely, by a traverse, is entirely peculiar to that system, and exists only because of trial by jury, the sole purpose of a traverse being to form an issue.

II. It is a well known rule that, upon a demurrer at common law, the court does not proceed to inquire whether or not the last pleading (*i. e.*, the pleading which is popularly said to be demurred to) is good in law, and give judgment accordingly, but begins with the declaration, and examines the pleadings in their order, and, if any pleading is found to be bad, gives judgment against the party who pleaded it, without examining any further, but, if all the pleadings are found to be good, gives judgment in favor of the party who pleaded last; and it has been generally supposed that this rule was peculiar to the common law, yet in truth the same rule has always existed in the civil and canon law, though with this difference, namely, that, while at common law the court has to inquire only whether the successive pleadings are good in law, in the civil and canon law it has to inquire also whether they are proved. The principle is the same in both, and it is this: the plaintiff's action is founded wholly upon his first pleading, and therefore unless that is both true in fact and good in law, he must fail, and no question will arise upon any of the subsequent pleadings. It will not follow, however, that the plaintiff will be entitled to a judgment because he succeeds upon his first pleading, for that may be destroyed by the new facts alleged in the defendant's first pleading; and the latter must, therefore, be the next subject of inquiry. Moreover, as the plaintiff's first pleading must contain the whole strength of his case, so the defendant's first pleading must contain his entire defence; and, therefore, if that be

found to be untrue in fact, or not good in law, the plaintiff will be entitled to judgment, and no question will arise upon the subsequent pleadings. If, on the other hand, both questions are answered in the affirmative, it will then be necessary to decide the same two questions as to the plaintiff's second pleading, and so on to the end. Upon all the pleadings subsequent to the defendant's first pleading, the sole question will be whether the plaintiff can destroy the defendant's first pleading, and thereby sustain his own first pleading, or whether the defendant can sustain his own first pleading, and thereby destroy the plaintiff's first pleading.

*C. C. Langdell.*

*[To be continued.]*



## THE CARRIER'S LIABILITY: ITS HISTORY.

THE extraordinary liability of the common carrier of goods is an anomaly in our law. It is currently called "insurer's liability," but it has nothing in common with the voluntary obligation of the insurer, undertaken in consideration of a premium proportioned to the risk. Several attempts have been made to explain it upon historical grounds, the most elaborate that of Mr. Justice Holmes.<sup>1</sup> His explanation is so learned, ingenious, and generally convincing, that it is proper to point out wherein it is believed to fall short.

His argument is in short this. In the early law goods bailed were absolutely at the risk of the bailee. This was held in Southcote's Case,<sup>2</sup> and prevailed long after. The ordinary action to recover against a bailee was detinue. But as that gradually fell out of use in the seventeenth century its place was necessarily taken by case; and in order that case might lie for a nonfeasance, some duty must be shown. There were two ways of alleging a duty: by a *super se assumpsit*, and by stating that the defendant was engaged in a common occupation. It was usual to include an allegation of negligence, from abundant caution, but that was "mere form." Chief Justice Holt<sup>3</sup> finally overthrew the doctrine of the bailee's absolute liability, except where there was a common occupation, or (of course) where there was an express assumpsit. The extraordinary liability of a carrier is therefore a survival of a doctrine once common to all bailments.

Judge Holmes does not explain satisfactorily why this doctrine should not have survived in the case even of all common occupations, but only in the case of the common carrier of goods; nor does he account for the fact that the carrier is held absolutely liable, not merely, like the bailee once, for the loss of goods, but, unlike that bailee, for injury to them. The difficulties were not neglected from inadvertence, for he mentions them.<sup>4</sup> But without laboring

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<sup>1</sup> The Common Law, Lecture V.

<sup>2</sup> 4 Co. 83 b; Cro. Eliz. 815. A fuller and better report than either of these is in a manuscript report in the Harvard Law Library, 42-45 Eliz. 109 b.

<sup>3</sup> In *Lane v. Cotton*, 12 Mod. 472, and *Coggs v. Bernard*, 2 Ld. Raym. 909; *obiter* in both cases.

<sup>4</sup> Page 199.

these points, his main proposition should be carefully considered. Is it true that the bailee was once absolutely liable for goods taken from him? It may be so; Pollock and Maitland seem to give a hesitating recognition to the doctrine,<sup>1</sup> but the evidence is not quite convincing.

No one versed in English legal history will deny that the bailee of goods was the representative of them, and the bailor's only right was in the proper case to require a return; and therefore that when a return was required it was incumbent upon the bailee to account. Nor can it be doubted that the law then tended to lay stress on facts rather than reasons, — to hang the man who had killed another rather than hear his excuse. We should therefore not be surprised, on the one hand, to find that, where one had obliged himself to return a chattel, no excuse would be allowed for a failure to return. On the other hand, by the machinery of warranty, it was always possible to explain away the possession of an undesirable chattel; why not to explain the non-possession of a desired one? We should therefore not be greatly surprised if the authorities allowed some explanation.

Three actions were allowed a bailor against a bailee: *detinue*, *account*, and (after the Statute of Westminster) *case*. Let us see whether in either of these actions the defendant was held without the possibility of excuse.

*Case* lies only for a tort; either an active misfeasance, or, in later times, a negligent omission. There must therefore be at the least negligence; and so are the authorities. The earliest recorded action against a carrier is *case* against a boatman for overloading his boat so that plaintiff's mare was lost; it was objected that the action would not lie, because no tort was supposed; the court answered that the overloading was a tort.<sup>2</sup> So in an action on the case for negligently suffering plaintiff's lambs, bailed to defendant, to perish, it was argued that the negligence gave occasion for an action of tort.<sup>3</sup> So later, in the case of an agister of cattle, the negligence was held to support an action on the case.<sup>4</sup> In these cases the action would not lie except for the negligence.<sup>5</sup> In the case of ordinary bailments, therefore, negligence of the bailee must be

<sup>1</sup> Hist. Eng. Law, 169.

<sup>2</sup> 22 Ass. 41 (1348).

<sup>3</sup> 2 H. 7, 11, pl. 9 (1487).

<sup>4</sup> Moo. 543 (1598).

<sup>5</sup> The *assumpsit* is also mentioned in them; but this means, not a contract that they shall be safe, but an undertaking to perform a certain purpose. Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 909, 919.



alleged and proved to support an action on the case against him. I shall hereafter consider actions on the case against those pursuing a common occupation.

In the action of account there is hardly a doubt that robbery without fault of bailee could be pleaded in discharge before the auditors.<sup>1</sup> To the contrary is only a single dictum of Danby, C. J., and there the form of action is perhaps doubtful.<sup>2</sup> Indeed, in Southcote's Case the court admitted that the factor would be discharged before the auditors in such a case, and drew a distinction between factor and innkeeper or carrier.

In the action of detinue then, if anywhere, we shall find the bailee held strictly; and the authorities must be examined carefully.

The earliest authority is a roll where, in detinue for charters, the bailee tendered the charters *minus* the seals, which had been cut off and carried away by robbers. On demurrer this was held a good defence.<sup>3</sup> The next case was detinue for a locked chest with chattels. The defence was that the chattels were delivered to defendant locked in the chest, and that thieves carried away the chest and chattels along with the defendant's goods. The plaintiff was driven to take issue on the allegation that the goods were carried away by thieves.<sup>4</sup> A few years later, counsel said without dispute that if goods bailed were burned with the house they were in, it would be an answer in detinue.<sup>5</sup> Then where goods were pledged and put with the defendant's own goods, and

<sup>1</sup> Fitz. Accompt, pl. 111 (1348); 41 E. 3, 3 (1367); 2 R. 3, 14 (1478); Vere v. Smith, 1 Vent. 121 (1661).

<sup>2</sup> 9 E. 4, 40 (1469). In an action of account, the court held that robbery could not be pleaded in bar, but if it was an excuse it must be pleaded before the auditor. Danby's remark, that robbery excuses a bailee only if he takes the goods to keep as his own, has no reference to the action itself. Brooke abridges the case under *Detinue*, 27.

<sup>3</sup> Brinkburn Chartulary, p. 105 (1299).

<sup>4</sup> Fitz., *Detinue*, 59 (1315). According to Southcote's Case and Judge Holmes (Com. Law, p. 176), Fitzherbert states the issue to have been that the goods were delivered outside the chest. Neither the first (1516) edition of Fitzherbert, nor others (1565, 1577) to which I have access, are so. In the printed book (8 E. 2, 275) it is indeed laid down as Gawdy and Holmes state it; we have therefore a choice of texts. It is common knowledge that Maynard's text is often corrupt; it is a century and a half further from the original; and in this case the inaccuracy is manifest. The text throughout has to be corrected by comparison with Fitzherbert in order to make it sensible. From internal evidence Fitzherbert's text must be chosen. It would be interesting to have a transcript of the roll.

<sup>5</sup> 12 & 13 E. 3, 244 (1339).

all were stolen, that was held a defence; the plaintiff was obliged to avoid the bar by alleging a tender before the theft.<sup>1</sup> Finally in 1432, the court (Cotesmore, J.) said: "If I give goods to a man to keep to my use, if the goods by his misguard are stolen, he shall be charged to me for said goods; but if he be robbed of said goods it is excusable by the law."<sup>2</sup>

At last, in the second half of the fifteenth century, we get the first reported dissent from this doctrine. In several cases it was said, usually *obiter*, that if goods are carried away (or stolen) from a bailee he shall have an action, because he is charged over to the bailor.<sup>3</sup>

In several later cases the old rule was again applied, and the bailee discharged.<sup>4</sup> There seems to be no actual decision holding an ordinary bailee responsible for goods robbed until Southcote's Case.<sup>5</sup>

This was *detinue* for certain goods delivered to the defendant "to keep safe." Plea, admitting the bailment alleged, that J. S. stole them out of his possession. Replication, that J. S. was defendant's servant retained in his service. Demurrer, and judgment for the plaintiff.

The case was decided by Gawdy and Clench, in the absence of Popham and Fenner; and it is curious that Gawdy and Clench had differed from the two others as to the degree of liability of a bailee in previous cases.<sup>6</sup> It would seem that judgment might

<sup>1</sup> 29 Ass. 163, pl. 28 (1355). Judge Holmes, following the artificial reasoning of Gawdy (or Coke?) says the pledge was a special bailment to keep as one's own. The reason stated by Coke is exactly opposed to that upon which Judge Holmes's own theory is based; it is that a pledgee undertakes only to keep as his own because he has "a property in them, and not a custody only," like other bailees. The court in the principal case knows nothing of this refinement. "For W. Thorpe, B., said that if one bails me his goods to keep, and I put them with mine and they are stolen, I shall not be charged." After refusal of tender, defendant would have been, not, as Judge Holmes says, a general bailee, but a tortious bailee, and therefore accountable. The refusal was the *detinue*, or as the court said in Southcote's Case, "There is fault in him."

<sup>2</sup> 10 H. 6, 21, pl. 69.

<sup>3</sup> 3 E. 4, 15, pl. 7, by Littleton (1462); 9 E. 4, 34, pl. 9, by Littleton and Brian, JJ. (1469); 9 E. 4, 40, pl. 22 (1469), by Danby, C. J. (*ante*); 6 H. 7, 12, pl. 9, per Fineux, J. (1491); 10 H. 7, 26, pl. 3; per Fineux, J. (1495). In the last two cases, Keble, *arguendo*, had stated the opposite view; and Brooke (*Detinue*, 37) by a query appears rather to approve Keble's contention.

<sup>4</sup> 1 Harvard MS. Rep. 3a (1589, stated later), *semble*; Woodlife's Case, Moo. 462 (1597); Mosley v. Fosset, Moo. 543 (1598), *semble*.

<sup>5</sup> 4 Coke, 83 b, Cro. Eliz. 815; Harv. MS. Rep. 42-45 Eliz. 109 b (1600).

<sup>6</sup> Woodlife's Case, Moo. 462; Mosley v. Fosset, Moo. 543.



have been given for plaintiff on the replication; the court, however, preferred to give it on the plea. This really rested on the form of the declaration; a promise to keep safely, which, as the court said, is broken if the goods come to harm. The only authority cited for the decision was the Marshal's Case, which I shall presently examine and show to rest on a different ground. The rest of Coke's report of the case (of which nothing is said in the other reports) is an artificial, and, *pace* Judge Holmes, quite unsuccessful attempt to reconcile, in accordance with the decision, the differing earlier opinions. The case has probably been given more authority than it really should have. At the end of the manuscript report cited we have these words: "Wherefore they (*cæteris absentibus*) give judgment for the plaintiff *nisi aliquod dicatur in contrario die veneris proximo*." And it would seem that judgment was finally given by the whole court for the defendant. In the third edition of Lord Raymond's Reports is this note: "That notion in Southcote's Case, that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione Magistri Bunbury*."<sup>1</sup> It was not uncommon for a case to be left half reported by the omission of a *residuum*; and it may be that Southcote's Case as printed is a false report. One would be glad to see the record.

Southcote's Case is said to have been followed for a hundred years. The statement does it too much honor. It seems to be the last reported action of detinue where the excuse of loss by theft was set up; and, as has been seen, the principle it tries to establish does not apply to other forms of action. It was cited in several reported actions on the case against carriers, but seems never to have been the basis of decision; on the other hand, in *Williams v. Lloyd*,<sup>2</sup> where it was cited by counsel, a general bailee who had lost the goods by robbery was discharged. The action was upon the case.

Having thus briefly explained why Judge Holmes's theory of the carrier's liability is not entirely satisfactory, I may now suggest certain modifications of it. I believe, with him, that the modern liability is an ignorant extension of a much narrower earlier liability;<sup>3</sup> but the extension was not completed, I think, for eighty

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<sup>1</sup> 2 Ld. Raym. 911 n.

<sup>2</sup> Palmer, 548; W. Jones, 179 (1628).

<sup>3</sup> See The Common Law, pp. 199, 200.

years after the date he fixes, and the mistaken judge was not Lord Holt, but Lord Mansfield.

From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a "common" or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers,<sup>1</sup> victuallers, taverners, smiths,<sup>2</sup> farriers,<sup>3</sup> tailors,<sup>4</sup> carriers,<sup>5</sup> ferrymen, sheriffs,<sup>6</sup> and gaolers.<sup>7</sup> Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskilfulness or improper preparation for the business. In the language of Fitzherbert, "If a smith prick my horse with a nail, I shall have my action on the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought."<sup>8</sup> By undertaking the special duty he warrants his special preparation for it. The action is almost invariably on the case.

One of the earliest cases in the books was against an innkeeper, stating the custom of England for landlords and their servants to guard goods within the inn; it was alleged that while plaintiff was lodged in the inn his goods were stolen from it. There was no allegation of fault in the defendant, and on this ground he demurred; but he was held liable notwithstanding. The plaintiff prayed for a *capias ad satisfaciendum*. Knivet, J. replied, that this would not be right, since there was no tort supposed, and he was charged by the law, and not because of his fault; it was like the case of suit against the hundred by one robbed within it; he ought not to be imprisoned. The plaintiff was forced to be content with an *elegit* on his lands.<sup>9</sup> A few years later a smith was sued for "nailing"

<sup>1</sup> 11 H. 4, 45, pl. 8; 22 H. 6, 21, pl. 38; ib. 38, pl. 8.

<sup>2</sup> 46 E. 3, 19.

<sup>3</sup> Often called "common marshal." 19 H. 6, 49, pl. 5.

<sup>4</sup> 1 Harv. MS. Rep. 3a.

<sup>5</sup> These were "country" carriers; the term did not at first include carriers by water.

<sup>6</sup> 41 Ass. 12.

<sup>7</sup> 33 H. 6, 1, pl. 3.

<sup>8</sup> F. N. B. 94 d.

<sup>9</sup> 42 E. 3, 11, pl. 13 (1367). In 43 E. 3, 33, pl. 38, it was alleged that a "marshal" had undertaken to cure a horse, but had proceeded so negligently that the horse died. The defendant was driven from a denial of the undertaking, and was obliged to traverse the defect of care.



the plaintiff's horse; the defendant objected that it was not alleged *vi et armis* or *malitiose*, but the objection was overruled, and it was held that the mere fact of nailing the horse showed a cause of action.<sup>1</sup> An action was brought against a sheriff for non-return of a writ into court; he answered that he gave the writ to his coroner, who was robbed by one named in the exigent. He was held liable notwithstanding, Knivet, J. saying, "What you allege was your own default, since the duty to guard was yours."<sup>2</sup>

In 1410, in an action against an innkeeper, Hankford, J. used similar language: "If he suffers one to lodge with him he answers for his goods; and he is bound to have deputies and servants under him, for well keeping the inn during his absence."<sup>3</sup> A noteworthy remark was Judge Paston's a few years later: "You do not allege that he is a common marshal to cure such a horse; and if not, though he killed your horse by his medicines, still you shall not have an action against him without a promise."<sup>4</sup> Soon after was decided the great case of the Marshal of the King's Bench.<sup>5</sup> This was debt on a statute against the Marshal for an escape. The prisoner had been liberated by a mob; the defendant was held liable. The reason was somewhat differently stated by two of the judges. Danby, J. said that the defendant was liable because he had his remedy over. Prisot, C. J. put the recovery on the ground of negligent guard. This case was frequently cited in actions against carriers; but not, I think, in actions against ordinary bailees before Southcote's Case.

The earliest statement of the liability of a common carrier occurs, I think, in the Doctor and Student (1518), where it is said that, "if a common carrier go by the ways that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed; or if he overcharge a horse whereby he falleth into the water, or otherwise, so that the stuff is hurt or impaired; that he shall stand charged for his misdeameanor."<sup>6</sup> In the time of Eliza-

<sup>1</sup> 46 E. 3, 19, pl. 19 (1371).

<sup>2</sup> 11 H. 4, 45, pl. 18 (1410).

<sup>3</sup> 33 H. 6, 1, pl. 3 (1455).

<sup>4</sup> 41 Ass. 254, pl. 12 (1366).

<sup>5</sup> 19 H. 6, 49, pl. 5 (1441).

<sup>6</sup> Doctor and Student, c. 38. A little later is found this curious case, Dall. 8 (1553). "Note by Browne, J., and Portman, J., as clear law; if a common carrier takes a pack of stuff from a man to carry it to D. and while in a common inn the pack is taken and stolen, the owner for this shall have an action against the innkeeper for the stuff and the carrier shall not; for they are not the goods of the carrier, nor shall he be charged with them inasmuch as he was by law compellable to carry them; and it is not like where one takes goods to carry generally, for if he be robbed, it shall be charged to

both, the hire paid to the carrier was alleged as the reason for his extraordinary liability.<sup>1</sup> Finally, in *Morse v. Slue*<sup>2</sup> the court "agreed the master shall not answer for inevitable damage, nor the owners neither without special undertaking; when it's *vis cui resisti non potest*; but for robbery the usual number to guide the ship must be increased as the charge increaseth."

Thus stood the law of carriers and of others in a common employment down to the decision in *Coggs v. Bernard*.<sup>3</sup> Two or three things should be noted. First, carriers are on the same footing with many other persons in a common employment, some bailees and some not, but all subjected to a similar liability, depending upon their common employment; and there is no evidence in the case of these persons of anything approaching a warranty against all kinds of loss. The duty of the undertaker was to guard against some special kind of loss only. Thus the gaoler warranted against a breaking of the gaol, but not against fire; the smith warranted against pricking the horse; the innkeeper against theft, but not against other sorts of injury;<sup>4</sup> the carrier against theft on the road, but probably not against theft at an inn.

Secondly. This is put on different grounds; but all may be reduced to two. On the one hand, it may be conceived that the defendant has undertaken to perform a certain act which he is therefore held to do: either because the law forces him into the undertaking (as a hundred is forced to answer a robbery), or, as seems to have been in Judge Paston's mind, because there was some consent which took the place of a covenant. On the other hand, it may be conceived that the defendant has so invited the public to

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the carrier for his general taking, to which he was not compellable, and so he shall have action over in respect of his liability." This is the only hint at a less liability of the common carrier than of the private carrier. It is interesting to notice that it was regarded as the duty of the innkeeper, and not of the carrier, to guard the goods in the inn. The duty is imposed by law for a purpose; that purpose is served by putting the duty on the innkeeper here; the law need not require a double service.

<sup>1</sup> "It was held by all the Justices in the Queen's Bench, that if a man bail certain cloths to a tailor to make a robe of them, who does so, and then it is stolen out of his shop, still he shall be accountable for it; the same is law of a carrier who has anything for his labor. But it is otherwise of him who has nothing for keeping it, but keeps it of his good will." 1 Harv. MS. Rep. 3a. To the same effect is *Woodlife's Case*, as reported in 1 Rolle's Abridgment, 2, as follows: "If a man deliver goods to a common carrier to carry, and the carrier is robbed of them, still he shall be charged with them, because he had hire for them, and so implicitly took upon him the safe delivery of the goods; and therefore he shall answer for the value of them if he be robbed."

<sup>2</sup> 3 Keb. 135 (1672).

<sup>3</sup> 2 Ld. Raym. 909 (1703).

<sup>4</sup> *Dawson v. Chamney*, 5 Q. B. 164.



trust him that certain avoidable mischances should be charged to his negligence; he ought to have guarded against them. "The duty to guard" is the sheriff's or the carrier's or the innkeeper's; he is bound to have deputies for well keeping the inn; if a mob breaks in he shall be charged for his negligent guard; the usual number must be increased as the charge increases; if he go by the ways that be dangerous, or at an inconvenient time, he shall stand charged for his misdemeanor. It is to be remembered that during this time case on a *super se assumpsit* had this same doubtful aspect; to use a modern phrase, it was even harder then than now to tell whether such an action sounded in contract or in tort. The test of payment for services is a loose and soon abandoned method of ascertaining whether the defendant was a private undertaker or in a common employment.<sup>1</sup>

Another thing important to notice is that all precedents of declarations against a carrier or an innkeeper allege negligence.<sup>2</sup> It is of course impossible to prove that this did not become a mere form before rather than after Lord Holt's time; but it is on the whole probable that it originally had a necessary place.

We have now brought the development of the law to the great case of *Coggs v. Bernard*.<sup>3</sup> This was an action against a gratuitous carrier, and everything said by the court about common carriers was therefore *obiter*. Three of the judges did, however, treat the matter somewhat elaborately. Gould, J. put the liability squarely on the ground of negligence: "The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. . . . When a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms." Powys, J. "agreed upon the neglect." Powell, J. emphasized the other view, that "the gist of these actions is the undertaking. . . . The bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is in 1 Jones, 179; Palm. 548. For the bailee is not bound upon any undertaking against the act of God." Holt, C. J. seized the occasion to give a long disquisition upon the

<sup>1</sup> Woodlife's Case, Moore, 462, makes that clear, I think. Though both are paid, a distinction is drawn between factor and carrier.

<sup>2</sup> Holmes, Common Law, 200.

<sup>3</sup> 2 Ld. Raym. 909 (1703).

law of bailments. In the course of it he said that common carriers are bound "to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable." And the reason is, that otherwise they "might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves," &c.

Was this the starting point of the modern law of carriers? It seems to be a departure from the previous law as I have stated it, but how far departing depends upon what was meant by act of God. Powell appears to include accidental fire, and cites a case where the death by disease of a horse bailed was held an excuse. Lord Holt does not explain the term; but his reasoning is directed entirely to loss by robbery. That "act of God" did not mean the same thing to him and to us is made probable by the language of Sir William Jones,<sup>1</sup> whose work on Bailments follows Lord Holt's suggestions closely. After stating Lord Holt's rule as to common carriers, he adds that the carrier "is regularly answerable for neglect, but not, regularly, for damage occasioned by the attacks of ruffians, any more than for hostile violence or unavoidable misfortune," but that policy makes it "necessary to except from this rule the case of robbery." As to act of God, "it might be more proper, as well as more decent, to substitute in its place inevitable accident," since that would be a more "popular and perspicuous" term. He cites the case of *Dale v. Hall*,<sup>2</sup> which appeared to have held the carrier liable though not negligent; but explains that the true reason was not mentioned by the reporter, for there was negligence. Much the same statement of the law of carriers is made by Buller in his *Nisi Prius*.<sup>3</sup> It would seem, then, that the change in the law which we should ascribe to Lord Holt was one rather in the form of statement than in substance; but the new form naturally led, in the fulness of time, to change in substance.

In the fulness of time came Lord Mansfield, and the change in substance was made. In *Forward v. Pittard*,<sup>4</sup> we have squarely presented for the first time a loss of goods by the carrier by pure accident absolutely without negligence, — by an accidental fire for which the carrier was not in any way responsible. Counsel for the plaintiff relied on the language of Lord Holt. Borough, for the

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<sup>1</sup> *Bailments*, pp. 103 *et seq.*

<sup>2</sup> 1 Wils. 281.

<sup>3</sup> Page 69 (1771).

<sup>4</sup> 1 T. R. 27 (1785).



defendant, presented a masterly argument, in which the precedents were examined; the gist of his contention was, that a carrier should be held only for his own default. Lord Mansfield, unmoved by this flood of learning, held the carrier liable; and he uttered these portentous words: "A carrier is in the nature of an insurer."

From that time a carrier has been an insurer without the rights of an insurer.

*Joseph H. Beale, Jr.*

## EXPERT TESTIMONY,—PREVALENT COMPLAINTS AND PROPOSED REMEDIES.<sup>1</sup>

IT is reported that a certain lawyer, in the trial of a case, having encountered the testimony of an expert witness called by his adversary, which threatened to ruin his cause, exasperated thereby and smarting under the sense of impending defeat, commenced his closing address to the jury as follows: "Gentlemen of the jury, there are three kinds of liars,—the common liar, the d—d liar, and the scientific expert."

This characterization was scarcely more severe than that which, in politer language, is bestowed upon learned and distinguished members of the medical profession, not only by defeated lawyers and their enraged clients, but also by eminent members of the legal profession, both lawyers and judges, as well as by worthy and respectable members of the general public outside of the professions involved. It is the voice of the people and of the press, as well as that of the bench and the bar. It is the fashion.

A judge of the Supreme Court of the United States has declared that "experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing instead of elucidating the questions involved in the issue."<sup>2</sup>

In a recent trial of a criminal case in the city of New York, after a week had been consumed in hearing expert testimony upon a subject concerning which an equal number of doctors had testified exactly opposite to each other, and all with equal positiveness, the judge told the jury to put all the expert testimony out of their minds, and pay no attention to it.

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<sup>1</sup> This article is, in substance, the Address delivered before the New Hampshire Medical Society at its annual meeting, May 22, 1897. It was furnished by the author, at our request, for publication in the HARVARD LAW REVIEW. We regret to say that it represents the last legal work of the learned writer. Judge Foster died August 13, 1897. — ED.

<sup>2</sup> *Winans v. N. Y. & N. E. Ry.*, 21 How. 101.



In the famous trial of Palmer, in England, in 1856, for the murder of Cook by poisoning, more than a dozen medical men and chemists testified with great positiveness, but in direct opposition to each other. Lord Chief Justice Campbell, in charging the jury, remarked: "With regard to the medical witnesses, I must observe that, although there were among them gentlemen of high honor, consummate integrity, and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness."

Professor John Ordronaux declared, in 1874: "There is a growing tendency to look with distrust upon every form of skilled testimony. Fatal exhibitions of scientific inaccuracy and self-contradiction cannot but weaken public confidence in the value of all such evidence. If Science, for a consideration, can be induced to prove anything which a litigant needs in order to sustain his side of the issue, then Science is fairly open to the charge of venality and perjury, rendered the more base by the disguise of natural truth in which she robes herself." And he adds: "Some remedy is called for, both in the interests of humanity and justice."

Clemens Herschel, civil engineer, has an article in 21 American Law Review, 571, full of complaints and scolding. According to him, the "prevalent method" is "*universally* condemned by judges, law-writers, experts themselves, and the jury." Such language is much too extravagant and unjust; it is manifest that the writer who speaks of the expert witness as "a man placed on the witness stand and condemned to say naught save in answer to ingeniously concocted, more or less rasping questions," must be very slightly acquainted with the "prevalent method," and must have had little observation of the style and manner of examination and cross-examination under the direction of discreet and enlightened judges in the New England courts.

Professor Charles F. Himes, in the Journal of the Franklin Institute, Vol. 135, p. 409, indulges in these remarks: "Perhaps the testimony which least deserves credit with a jury is that of the skilled witness. It is often surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judg-

ment becomes so warped by regarding the subject in one point of view that even when conscientiously disposed, they are incapable of expressing a candid opinion. . . . They are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is in many instances the result alone of employment and the bias growing out of it."

It would be deplorable, indeed, if such criticisms were justified by the facts.

This "bias," or inclination in favor of the party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness; and the inclination or partiality is often characterized by terms indicating dishonesty and corruption; but it is my belief, resulting from the observation and experience of many years, that there are few instances in which a scientific witness permits himself to testify or to be engaged on a side contrary to his convictions derived from a careful examination of the case.

It is not unnatural that a man of strong conviction (at the same time honest and unpurchasable) should become the earnest advocate of his theory, and the zealous assistant of the attorney in preparing, and to some extent conducting his case in court; and the attorney does well to secure his testimony and service (and would be negligent and wanting in fidelity to his client if he did not) by a suitable recognition of his value to him and his cause; and I agree with Professor Himes that there is no rule of ethics that should cause the witness to refuse the reward of his labor that would not apply equally to the attorney, so long as the testimony on the witness stand is without conscious untruth. On the other hand, neither is there anything in legal ethics to require a lawyer to select a lukewarm, half convinced representative of his theory of the case, and probably he never does. But the bias of the expert witness may not always be incidental to his calling or profession, but a purely scientific bias, due to some peculiar view or theory. Against such a bias no amount of self-restraint nor the most sensitive conscience will fortify a man. We all remember how, not many years ago, one of the gravest of all questions, a question involving the safety of the republic, was submitted to a tribunal composed of Senators and Representatives in Congress and Judges of the Supreme Court, — fifteen in all, — picked men, selected from those distinguished for their integrity and freedom from undue influence, and yet all the questions before the tribunal were decided



eight to seven; always the same eight, always the same seven, always along the same line of political division.<sup>1</sup> I do not suppose the tribunal was ever seriously distrusted; but the bias of those men was absolutely uncontrollable. It was the result of overwhelming circumstances, and not of depraved consciences.

It has been suggested, not without a considerable degree of truth, that one cause for the severe criticism to which the scientific expert has been subjected by men of the legal profession is, that "in many respects he seems to be a positive annoyance to lawyers and even to judges at times, a sort of intractable, incompatible, unharmonious factor, disturbing the otherwise smooth current of legal procedure; too important or necessary to be ruled out, too intelligent and disciplined mentally to yield without reason to ordinary rules and regulations of the court, with which he may not be familiar, and at the same time possessing an undoubted influence with a jury that it is difficult to restrict by the established rules and maxims of legal procedure."<sup>2</sup> I have seen such a witness on the stand. The spectacle was that of an honest, upright, learned, honorable, conscientious man, deserving and commanding respect and admiration.

Such as I have said being the voice of public opinion in general, the inquiry arises, Is it justified by the fact? That there would seem to be some warrant for this public sentiment, a few instances, falling within my own experience, will serve to illustrate.

In the trial of Le Page for the murder of Josie Langmaid, in 1874, blood-stained garments had been subjected to chemical and microscopical analysis. Dr. Horace Chase, Dr. J. B. Treadwell, and S. Dana Hayes, witnesses called by the State, all testified that blood corpuscles may be restored to perfect shape after the lapse of *ten years*, and that dried human blood can then be distinguished from that of common domestic animals. On the other hand, Drs. John B. Edwards and Gilbert R. Guilden of Montreal, witnesses for the defence, testified that after the lapse of *two weeks* it is impossible to restore dried corpuscles to their original size, and to distinguish with any certainty human blood from that of other mammalia.

Upon the trial of the Barker Will Case, in answer to the following hypothetical question: "Does occasional dizziness, a feeling of oppression in the head, inability temporarily to concentrate the

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<sup>1</sup> 135 Jour. Frank. Inst. 427.

<sup>2</sup> 135 Jour. Frank. Inst. 411.

thoughts, difficulty about casting interest and adding up figures, manifested on two or three occasions, slight numbness and prickling sensations occasionally, temporarily cold extremities, — do all or any of these symptoms indicate existing disease of the brain? or do all or any of them indicate existing disease of the mind?"

Dr. A. answered: "They do not."

Dr. B. said: "The symptoms indicate chronic softening of the brain."

Dr. C.: "The symptoms do not necessarily indicate any disease of the brain."

Dr. D.: "No doubt whatever he had softening of the brain; his brain was rotten."

Dr. E.: "Such symptoms are very common. They do not indicate any brain disease."

Dr. F.: "They do."

Dr. G.: "They don't."

Dr. H.: "They do."

Dr. I.: "They don't."

Dr. J.: "They do."

The vote of the doctors was five to five. All these men were drawn from the highest ranks of their profession. I have no doubt that some of them were thoroughly honest; all may have been; for the case under consideration was one of mental disease, concerning which, perhaps more than any other subject of scientific investigation, learned men may honestly differ in opinion.

Mental disease or insanity, as every one is well aware, is one of the most frequent subjects of inquiry in courts of law, since it affects the capacity of individuals to commit crimes, to make legal contracts, and to dispose of their estates by will; and one reason why acknowledged experts sometimes differ so widely in their testimony on this subject, in the same case, is the almost insuperable difficulty of determining by any test and the highest degree of skill whether a man is insane or not. There seems to be very often some room for doubt. The mind in question may occupy a position in close proximity to the border lines which separate sanity from insanity; and those lines may be as difficult of discernment as the line which separates the twilight from the last remains of day.<sup>1</sup>

"It is true," said Lord Erskine, addressing a British jury, "that

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<sup>1</sup> Professor Washburn, in 1 *Am. Law Rev.* 49.

in some cases the human mind is stormed in its citadel and laid prostrate under the stroke of frenzy. . . . There, indeed, all the ideas are overwhelmed, — for Reason is not merely disturbed, but driven wholly from her seat. . . . In other cases Reason is not driven from her seat, but Distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety. . . . And there are cases where imagination, within the bounds of the malady, still holds the most uncontrollable dominion over reality and fact; and these are the cases which frequently mock the wisdom of the wisest in judicial trials.”

The New Hampshire courts have abandoned the attempt to formulate any legal definition of “unsound mind”; a scientific definition is impossible, and the courts of New Hampshire no longer make a capacity to distinguish between right and wrong, or the presence of delusions, the test of guilt or innocence in criminal accusations; but the sole inquiry is, Was the act complained of the product of mental disease?<sup>1</sup>

While upon this branch of our subject, it may not be irrelevant to allude to the ridiculous tendency among some professional men, both legal and medical, to make excuse for crime by increasing the number of mental diseases called insanity. The catalogue of such men includes moral insanity, insane impulse, insane delusion, monomania, dipsomania, kleptomania, pyromania, erotomania, theomania, homicidal mania, suicidal mania; and we have even heard of gamomania, or the insane desire to marry; frauenschustelmonomania, or the mania for stealing women’s shoes; and frauenschlagermonomania, or the propensity for beating one’s wife. For the cure of some of these fanciful maladies, I suggest that courts and penitentiaries are better fitted to provide effectual remedies than doctors and sanitariums. But I am digressing.

Professor Himes is of the opinion that “no class connected with the administration of justice is more frequently misunderstood or abused than medical men, unless perhaps we may except the legal fraternity itself; for the latter are often, by the laity, accused of bold mendacity, unscrupulous methods, and dishonest practices. And they sometimes even contribute to this popular impression by contradictions or even abuse and apparent mistrust of each other, even to a greater degree than scientific experts. And yet no one would hold the profession of the law less a necessity in the admin-

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<sup>1</sup> *State v. Jones*, 50 N. H. 369.



istration of justice, or consider it fairly represented by cases that may be regarded, if they exist at all, as glaring exceptions, pictures all the more grotesque for the background of professional character upon which they are cast."<sup>1</sup>

While it is undoubtedly true that a large proportion of the public (including learned and experienced members of the legal, and even of the medical profession) entertain pessimistic views concerning the value of expert testimony, as it is ordinarily given and received in courts of justice, few, I imagine, would go so far in its condemnation as the New York judge, who told the jury to pay no attention to it. On the contrary, a moment's consideration must convince all reasonable men that it is of the greatest importance that a jury, or other tribunal charged with the duty of ascertaining the truth concerning a controverted matter, should be assisted by the knowledge and opinion of men specially trained in those matters of science and skill with which the ordinary juror and judge are unacquainted; and to exclude such means of information must, in innumerable instances, compel a denial of justice, imperil rights of life, liberty, and property, and destroy the safeguards of society.

A learned and practical chemist can tell (but I cannot, nor can any juror) whether the stains upon a garment are of blood or rust; and if of blood, whether it be the blood of man or beast; and yet upon the true answer to such an inquiry a human life may depend. So the question whether a death has been caused by poison can ordinarily be determined only by an experienced toxicologist. Indeed, the field of judicial investigation requiring the assistance of experts is illimitable. The anatomy of the human frame, the diseases of the human body, the derangement of the functions of the human brain,—in some form or other these are matters of daily investigation in the courts, and concerning all these things the average juror, lawyer, and judge is so profoundly ignorant that the search for truth, unaided by the knowledge and judgment of scientific and medical experts, would be utterly hopeless.

The validity of patents, and any and every case involving any subject of mechanics, the genuineness or fraudulent character of a signature or other writing, are a few among the many examples of the scope of this inquiry. We have recently seen it illustrated in respect to the navigation of a vessel, where the question

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<sup>1</sup> 135 Jour. Frank. Inst. 412.

whether a sailor, in certain conditions, could leave the wheel long enough to commit a murder, became one of vital importance, although unfortunately it was answered in the affirmative and negative by an equal number of experienced sea-captains. And yet we seldom find, at least in this community, a doctor, or a chemist, or a toxicologist, or an inventor, or a sailor, upon the panel of jurors.

It has been said, with truth, that "the scientific expert is a product of an advanced and rapidly advancing civilization; that he has acquired an immensely increased importance, and a much wider field, and a far greater frequency of employment by the recent marvellous advances in the applications of science,—applications which have increased the sphere of things to be litigated about."

And expert testimony is admitted, not only from the *necessity* growing out of the advanced civilization of the age, but in accordance with a rule of law which requires the production of the *best* evidence. An illustration of the employment of the best evidence is furnished in the case of a man accused of poisoning his wife by giving her medicine containing arsenic. The chain of circumstances leading to the guilt of the accused was strong, but incomplete,—one link was wanting. There was no *positive* evidence that the draught of medicine contained arsenic. The cup which had contained the medicine was cracked by heating it on the stove, but the spilled liquid had been carefully wiped off by the accused. The question was put to four scientific experts whether arsenic could still be detected upon the stove after three months' constant use. Three of the experts said, "No"; the fourth thought that possibly it could. The accused, persuaded by his counsel and conscious that he had carefully removed the liquid, asked for an examination of the stove, which was granted. Half as much rust as would lie on the point of a knife was scraped off, and incontestable evidence of the presence of arsenic was obtained. The essential missing link was supplied. All the experts as well as the jury were satisfied. This experiment furnished the *best* evidence, obtainable only through the aid of skilled experts.

And so, Professor Himes truthfully remarks: "The public should be impressed with the fact that the testimony of scientific experts is an important factor in the trial of cases, becoming more and more important with the advancement of science in new and

as yet unexplored regions; that the courts *cannot exclude it, if they would*; and that the effect and value of the best evidence which the most advanced science can produce should not be impaired by fashionable and unjust assault and unnecessary taint."<sup>1</sup>

It is a settled rule of law in New Hampshire, that "experts may give their opinions upon questions of science, skill, or trade, or others of the like kind, or where the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or where it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it. . . . Upon subjects of general knowledge which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the testimony of witnesses as experts merely is not admissible."<sup>2</sup> A physician testifying as an expert may give an opinion founded upon his reading and study alone.<sup>3</sup> And, by statute, "the opinions of witnesses as to the value of any real estate, goods, or chattels may be received in evidence thereof when it appears to the court that they are qualified to judge of such value."<sup>4</sup>

Concerning the value and necessity of expert testimony, the courts in other jurisdictions have expressed their views in a multitude of judicial decisions. I cite a few instances.

"The opinion of a well instructed and experienced medical man, upon a matter within the scope of his profession and based on personal observation and knowledge, is, and ought to be, carefully considered and weighed by the jury."<sup>5</sup>

"The opinions of medical men are received with great respect and consideration, and properly so."<sup>6</sup>

"It is well settled that the knowledge and experience of medical experts is of great value in questions of insanity."<sup>7</sup>

"Medical testimony is of too much importance to be disregarded. When delivered with caution and without bias in favor of either party, or in aid of some speculative and favorite theory,

<sup>1</sup> 135 Jour. Frank. Inst. 436.

<sup>2</sup> *Jones v. Tucker*, 41 N. H. 547; *Winans v. N. Y. & N. E. Ry.*, 21 How. 101.

<sup>3</sup> *Taylor v. Grand Trunk Railway*, 48 N. H. 311.

<sup>4</sup> N. H. Pub. Stats., c. 224, s. 22.

<sup>5</sup> *Flynt v. Bodenhamer*, 8 N. C. 205.

<sup>6</sup> *Thomas v. The State*, 40 Texas, 65.

<sup>7</sup> *Russell v. The Commonwealth*, 86 Pa. St. 260; *Jarrett v. Jarrett*, 11 W. Va. 626; *Choice v. The State*, 31 Ga. 481.



it becomes a salutary means of preventing even intelligent juries from following a popular prejudice, and deciding a cause on inconsistent and unsound principles."<sup>1</sup>

The opinion of an expert should ordinarily be asked upon a hypothetical statement of facts.<sup>2</sup> Mr. Chief Justice Shaw states the rule thus: "In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued; either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified of are true, he can form an opinion, and what that opinion is."<sup>3</sup>

"If the hypothetical question is clearly exaggerated and unwarranted by the testimony in the case, an objection to it will be sustained."<sup>4</sup>

"Counsel will not be permitted to embrace in a hypothetical question anything not proved or offered to be proved."<sup>5</sup>

The form of the question may be modified and shaped by the court.

"Questions need not be hypothetical when the expert is personally acquainted with the material facts of the case. Thus, if a physician visits a person, and from actual experience or observation becomes acquainted with his mental condition, he may give his opinion respecting such mental condition at the time; that is, he may state to the jury his opinion as to the sanity or insanity of the person at the time he observed or examined him."<sup>6</sup>

And where a medical expert had made a personal examination of the uterus of a deceased woman it was proper to ask him, "What in your opinion caused the death of the woman?"<sup>7</sup>

Great latitude of interrogation is sometimes permitted by the judge, in the exercise of his discretion.<sup>8</sup>

But, also, the court has judicial power to *limit* the range of testimony and of the examination within the "lines of reasonableness."<sup>9</sup>

<sup>1</sup> Clark v. The State, 12 Ohio, 483.

<sup>2</sup> Willey v. Portsmouth, 35 N. H. 303; Spear v. Richardson, 37 N. H. 34.

<sup>3</sup> Dickinson v. Fitchburg, 13 Gray, 556.

<sup>4</sup> Muldowney v. Ill. Cent. Ry., 39 Iowa, 615.

<sup>5</sup> Fraser v. Jennison, 42 Mich. 227.

<sup>7</sup> State v. Glass, 5 Oregon, 73.

<sup>9</sup> Darling v. Westmoreland, 52 N. H. 411.

<sup>6</sup> State v. Felter, 25 Iowa, 75.

<sup>8</sup> 1 Greenl. Evid., § 449.

It will be observed that the most frequent and most serious complaint concerning expert testimony is the *want of agreement* upon the same subject and in the same case, among equally learned men, rendering their testimony (it is said) uncertain, confusing, and bewildering to the extent that it is unreliable and of little value; and yet I doubt if an intelligent, thoughtful, and candid man can be found, who will not admit that, notwithstanding all its faults and imperfections, it would be impossible to get along without it.

It is certainly true that there are and always will be differences of opinion among experts of the highest character, "rarely in regard to well-established facts, but often in regard to probable inferences from facts; whilst entire agreement in matters of theory and speculation would be marvellous." But concerning this alleged misfortune, it seems hardly becoming for the *legal* profession to indulge in severe criticism, since there is no profession so strongly characterized by differences of opinion on every subject, — lawyers, as well as judges constantly disagreeing, and the latter not unfrequently overruling one another's decisions, — unless it be the clerical profession, the members of which, it may have been observed, are not entirely unanimous in their interpretations of the Holy Scriptures.

Yes, it is a visible truth that doctors, as well as lawyers and ministers of the Gospel, do disagree. It would be marvellous and deplorable if they did not. If there were no disagreement, investigation and experiment would cease; and science, literature, and art would sink to a dead level of stupidity and laziness. If scholars and learned men had come to a condition of unanimous agreement a hundred years ago, we should have had none of the marvellous discoveries and inventions, — none of the magnificent victories and triumphs in medicine and surgery, — that have distinguished and illuminated the closing years of the nineteenth century,

It will be observed that the faults and imperfections of the present system and methods of procedure in the matter of scientific testimony are not magnified to my vision.

For whatever is wrong and capable of redress, for so much of the evil of the present system as is not imaginary, what and where is the remedy? Without any progress toward a satisfactory result, search for it has been prosecuted for years and years.

In Germany, and perhaps elsewhere on the European continent,

the following method has been established. For certain matters and lines of business (I have not ascertained what these are) permanent experts are appointed by the state. They have no official title nor regular salary, and their payment barely compensates them for loss of time. But in most cases the expert is appointed by the particular judge sitting in the case. He may appoint any man suggested by both parties, or he may also appoint a third man not suggested by either; but if both parties agree on one man, he *must* be appointed. If a question is involved for which the regular permanent experts are provided, these only can be appointed. The only essential qualifications of the expert are that he should follow the particular line of business to which the inquiry relates, for the purpose of earning his living. The number of experts testifying in a case is not limited by law, but (as with us) it rests in the discretion of the presiding judge.

The manifest, and to my mind the fatal, objections to this method are: the compulsory appointment, in certain cases, of the permanent experts; the denial of the right (a constitutional right in this country) of a party to select his own witnesses; and the absence of the qualification of professional learning and ability. For I fully agree with the observations of Dr. Henry Smith Williams, in the *North American Review* for February, 1897, that "mere average medical knowledge does not supply proper qualifications for expert testimony in all kinds of cases; as, for example, in cases involving chemical or microscopical examinations, or inquiries concerning mental conditions, — cases demanding the use and application of quite different kinds of technical knowledge. A physician may have the best professional training and the highest standing in his profession, and yet be utterly incapable of making a thorough microscopical or chemical examination, or of forming a really competent judgment as to the mental condition of an obscure case of alleged insanity. Clearly then a man should not be permitted to qualify as an expert simply because he has good professional standing as a physician." And an American judge, unless greatly deceived, will not permit a clearly incompetent person thus to qualify.

There have been in this country so many advocates of the German method, that it would seem that the experiment would have been tried in some one at least of the States of the Union if the sentiment of the legal profession had not been quite strong against it; contrary to the opinion of Mr. Clemens Herschel, civil engi-



neer, who, mistakenly, understands that "great unanimity exists among professional men in the choice of a remedy."<sup>1</sup> Mr. Herschel would have the expert witness appointed by the court; but would also permit the parties in a suit to employ others, according to the present practice. A similar plan is advocated by an anonymous writer in 5 *American Law Review*, 227, 248. But it seems to me this plan would only aggravate the existing difficulties, by tending to place three instead of two classes of experts in antagonism.

Prof. John Ordronaux is one of many who are in favor of having expert witnesses appointed by the court, and excluding all others. He thinks "the expert should be regarded as an *amicus curiæ*, whose opinion should be a conclusive judgment."

That condition would seem to destroy his function as a witness, leaving him to *instruct* the judge as to what is the fact, and the judge to instruct the jury accordingly, — a theory and practice obnoxious in the extreme, and subversive of the rule that the jury alone shall determine all questions of fact. "The expert," he says, "should be in no sense a witness. He should have his *status* defined, should be free from alliances with either party, and give his opinion only upon an *agreed* statement of facts."<sup>2</sup>

The learned Professor does not inform us by what process the court shall compel contending parties to agree.

And he goes on to announce the following novel proposition: "Remove all experts from the field of testimony, and place them in that of *arbitration*. Whenever a scientific question arises whose solution is material, let a *feigned issue* be made upon the points and referred for judgment, upon evidence agreed upon, to three experts, one to be selected by each party litigant and the third by the court, such experts to sit and determine at once the question in dispute, and their opinion to be received by the jury as conclusive of the issue tried by them. And, with a view to secure economy in time from the application of these views to practice, counsel desiring to invoke the assistance of experts should be required to give notice to the court and opposite party of such intention, so that the scientific issue upon which their services will be required could be tried in advance, and the ordinary course of judicial proceedings at *nisi prius* not be interrupted by the interpolation of new and exceptional matter. We need not point out," he says, "how much this would tend to simplify and abridge trials."<sup>3</sup>

<sup>1</sup> 21 *Am. Law Rev.* 572.

<sup>2</sup> See also 5 *Am. Law Rev.* 442.

<sup>3</sup> 9 *Albany Law Journal*, 122.

A writer in the same volume (p. 146) combats this proposed remedy, while advocating another not less unique. He remarks, very truthfully, that "a feigned issue in a trial for murder, for instance, would strike many as singular"; and then he proceeds to announce a plan which will strike many others as scarcely less singular: "Why not authorize the court to associate with itself an expert who, jointly with the judge, would preside at the trial, direct and control the examination of witnesses, and sum up at the close before the summing up by the law judge. After his summing up, and before the jury are charged by the court, there would be an opportunity of questioning him fully with respect to all points not previously developed in the course of the trial. All hypothetical examination would thus be excluded; testimony, science, and law would all be fully brought out, and all confined to the matter in hand."

I have no comment to make concerning this proposition other than that such a composite tribunal of "testimony, science, and law" would, as it seems to me, not only "strike many as singular," but would not be entertained for a moment by any practical lawyer.

In Massachusetts, efforts have been made at frequent times during the last twenty years to procure legislation on this subject, but no proposed scheme has found favor with the legislature. In New York, Pennsylvania, Illinois, and, I presume, in other States, attempted legislation in this direction has only encountered defeat. The latest effort was in February of this year, when the Massachusetts Medico-Legal Society and the Boston Medico-Psychological Society joined in the construction of a bill which was urged before the Judiciary Committee of the House, but was not approved by that body. The bill provided that the parties to any proceeding in court, before the trial, may agree upon an expert who shall make such an examination of the case as may in his judgment be necessary and practicable, who shall give his written opinion thereon, and shall attend the trial of the cause and answer such questions as may be put to him. If the parties do not agree, the court, or any judge in vacation, may appoint one or more persons learned in the special branch or branches of the science or medicine involved in the case. These persons, if more than one are appointed, shall confer and give their opinion in writing. If they do not agree they shall state in writing the points upon which they differ. If the parties do not agree, the court, upon motion of either party, or

upon its own motion, may appoint. The compensation of these experts shall be fixed by the court and paid by the county, but the defeated party shall refund the amount so disbursed. No medical expert shall be admitted to testify before any court except as thus provided, and except in criminal cases, in which the defendant may call other medical expert witnesses, at his own cost, and in such case like witnesses may be called and examined by the Commonwealth.

Before the preparation of this bill, the subject had been extensively discussed by some of the most learned doctors and jurists in Massachusetts, — among them Dr. J. J. Putnam, Dr. H. I. Bowditch, Dr. John L. Hildreth, the late Professor and Judge Emory Washburn, and the late Professor and Chief Justice Joel Parker, without any uniformity of conclusion. Dr. Putnam was of the opinion that great advantages would be gained if experts "instead of being restricted to the answering of hypothetical questions, so framed by counsel as to accentuate their differences of opinion, were allowed to fully explain and discuss the case, a proceeding which would often bring out their points of agreement, and prevent their differences from standing out in full and often partially false relief."<sup>1</sup> In my opinion, the learned doctor is mistaken in assuming that the defect of which he complains does in fact exist to any considerable extent. It is the result of my own observation and practice that the expert witness is not thus "restricted," but that, within the scope of a broad latitude, an intelligent medical witness is allowed and encouraged, and indeed often required, to "fully explain and discuss the case."

It has been proposed that "a certain number of scientific men should, in certain circumstances, sit upon juries and hear the evidence, as ordinary juries do at present." Upon this suggestion two important questions arise, which I find myself unable to answer: 1. How shall these subsidiary jurors be selected? 2. Would they be any more likely to agree in the jury box than on the witness stand?

Dr. H. S. Williams, in the article before referred to, suggests the novel proposition that the "real expert should be sifted from the pseudo expert by the process of searching civil service regulations." The manifest objections to this arrangement are these, among others: it would seem to be impossible to constitute a Scientific Civil Service Board, the members of which would themselves

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<sup>1</sup> Boston Med. & Surg. Journal, Feb. 11, 1897.



possess all or even a considerable proportion of the qualifications for the examination of candidates in all the various branches of science concerning which experts are called to testify, and equally impracticable to establish and maintain the requisite large number of independent Civil Service Boards.

The proposal to have medical experts selected by and serve as advisers of the court, instead of being employed by the plaintiff and defendant, has been met on the part of our best lawyers and judges (among them the distinguished Chief Justice Joel Parker) by the statement that such restrictions would interfere with the fundamental and constitutional right of a litigant to summon and employ any one whom he sees fit in behalf of his cause. I am unable to discover any answer to this objection.

Judge Washburn, while in favor of continuing the present method of summoning experts, thought the presiding judge should have power himself, if in his judgment the interests of justice would be promoted thereby, to summon experts of his own choice, who should review the whole testimony and evidence of the experts called by the litigants. The proposition strikes me favorably; and I can see no legal objection to legislation (if legislation be required, as probably it is not) to that effect. If the scheme be opposed on the ground that a party is thus compelled to accept the testimony of a witness not of his own choice, the answer is, that each party, while not restricted in his own choice, is *now* compelled to accept a witness chosen by his adversary; and it cannot be less in the interest of justice that both parties should be compelled to accept the additional testimony of a witness called by an unbiased and indifferent judge.

With reference to a jury or other tribunal composed wholly or in part of experts, one of the most eminent of English jurists, the late Sir James Fitzjames Stephen, discovered so many "difficulties of detail and practice" in the adoption of any such plan, that it seemed, in his judgment, to be most injurious. It was his opinion (in which I fully concur) that, "given uprightness, patience, and such intelligence as most educated members of society possess, a jury constituted as our juries are forms the very best tribunal which could be devised for the trial of complicated questions of fact, even if those questions involve delicate scientific considerations."<sup>1</sup>

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<sup>1</sup> 2 Juridical Society Papers, 238.

It seems to me that such men as ordinarily compose our juries are more likely to arrive at an unprejudiced and correct conclusion than a jury of experts, or a jury bound by the decision of experts. Certainly such men will be uninfluenced by pride of opinion or professional rivalry. I am strongly of the opinion that, aided by all the machinery and appliances which courts of law afford for the ascertainment of truth, in cases civil and criminal, and no matter how complicated, — namely, certain well defined rules of practice established by law and by the sanctioned experience of ages, among which are a broad latitude of examination and cross-examination, in which the court often participates, and the liberty which is usually given a scientific witness for explanation and illustration, — ordinary men are quite capable of forming a trustworthy conclusion. I say trustworthy; for that is all that can be expected or required. Comparatively few subjects of expert testimony are capable of absolute demonstration; and the judgment of a jury or an expert is ordinarily no more certain than that the conclusion, in a civil case, is *probably* correct, and, in a criminal case, that the accused is *probably* innocent, or that his guilt is established beyond a reasonable doubt.

Finally, my belief is, that the supposed evils of the present system are much exaggerated, and to a great extent imaginary; that they are not to be cured by any remedy that has been or seems likely to be devised, and that, on the whole, it is best to "let well enough alone."

The scientific expert should be paid *as such*. "He is not a witness in the ordinary sense, unless called merely to testify to some fact which he has observed, — and then he is not an expert. His position and office is that of sworn interpreter of science to the court." To illustrate. Stained garments are placed in the hands of a chemist to decide the significance of those stains by scientific tests. His chemical reagents show them to be blood stains, and a microscopical test shows that the blood is that of a fish or reptile. His testimony does not connect those garments with the prisoner, and has nothing to do with his guilt or innocence. As a *witness* he has added no *fact* to the record. The stained garments were there already, — but by scientific processes he interprets for the court those discolorations, and makes legible what was written in blood on the clothing. This is professional work, accomplished only after and by means of long, patient, and costly study, and for this service he is as much entitled to compensation as the lawyer whose

long years of patient and expensive study have qualified him to practise at the bar.<sup>1</sup>

Dr. Putnam (in the Boston Medical and Surgical Journal, October 22, 1896) gives some advice to his professional brethren which seems to me worthy of serious consideration. He says: "As a matter of fact, we go into court prepared to accentuate our differences and to minimize our agreements, and this unedifying state of affairs is partly due to the fact that we enlist ourselves too much as lawyers on one and the other side. . . . Our legal colleagues expect too much when they ask us to give only that portion of our views which makes their side of the argument appear stronger. . . . It is more common to hear the truth told than the whole truth. . . . Experts who trust one another should more frequently seek the privilege of consultation together before appearing in court. . . . There is room for real and reasonable disagreement between experts, but I think we might at least agree in seeking to *bring about early settlements*, on the ground that, so far as one can judge, the plaintiff, the defendant, and the community would generally be the gainers. . . . In this direction physicians can do much to educate the public mind, provided only they act in concert."

Dr. Walton, in the periodical last cited, remarks: "I think one of the dangers in giving expert testimony is the tendency for the expert to feel that he carries the whole case on his own shoulders, and must decide questions that ought to be left to the jury. . . . Finally, the scientific witness should come into court with clean hands and a pure heart; with sincerity of purpose; with a tendency and desire to ascertain and recognize truth wherever it may be found; to conceal nothing; mindful of his oath, which requires him to speak not only the truth, but the whole truth."

In the language of another: "His testimony should be the colorless light of science brought to bear upon the case. . . . To the true expert, in that responsible position, the utterance of half truths should be simply impossible."

William L. Foster.

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<sup>1</sup> Dr. W. W. Godding, in 138 North Am. Rev. 608.



# HARVARD LAW REVIEW.

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THE LAW SCHOOL. — The Law School opened on the first Monday in October, with the largest entering class in the School's history. The proportion, too, of second and first year students who have returned is unusually large. Full statistics will appear in the December number.

The continued illness of Professor Williston, a matter of sincere regret to all interested in the School, has made necessary a change in the curriculum as given out in the annual announcement. Professor Ames again has charge of Contracts, and Professor Beale of Pleading. Professor Williams is conducting Bills and Notes, and Mr. Charles B. Barnes, Jr., LL.B. 1893, is giving Suretyship, which this year is open to second as well as third year students. Mr. Ezra R. Thayer, LL.B. 1891, is conducting a course on Massachusetts Practice.

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THE NEGOTIABLE INSTRUMENTS LAW. — Diversity in the commercial laws of our different States has been the source not only of much inconvenience, but of inextricable confusion and of great loss to business interests. Upon some of the most important subjects, legislatures and courts have established several conflicting rules, and in some instances Federal and State courts have held contrary views in regard to the same question in the same jurisdiction. Especially perplexing and unsuited to our needs as a commercial country has been the law governing negotiable paper. Yet considering the vast amount of interstate business transacted by means of this form of currency, and the ever increasing disregard of State lines by commercial enterprise, there is in this subject the greatest need of simplicity and uniformity.

Happily, effective measures have been adopted during the last few years to change this unfortunate condition of affairs. In many of the States, for the sake of uniformity, days of grace have been abolished, and the holiday laws have been so modified as to make paper maturing on

holidays fall due on the succeeding instead of the preceding day. The most important step so far taken, however, has been the appointment, in twenty-seven States, of commissioners on uniformity of laws. At the national conference of these commissioners in 1895 the committee on commercial law was instructed to prepare a codification of the law relating to negotiable paper. The draft prepared under the direction of this committee, and finally adopted by the commissioners in 1896, was modelled somewhat after the English Bills of Exchange Act, embodied suggestions by prominent lawyers and judges in England and the United States, and usually followed in cases of conflict the decisions of the Supreme Court of the United States. In this form the Negotiable Instruments Law has been enacted by the legislatures of Connecticut, Colorado, Florida, and New York; and special efforts, it is said, will be made by the commissioners to have the statute passed by the legislatures of many other States at their next session.

The Negotiable Instruments Law went into effect in New York on October 1 of the present year, and has modified the law of that State in several particulars. Perhaps the most important change is the abolition of the rule of *Coddington v. Bay*, 5 Johnson Chanc. Rep. 54, which has been the law in New York ever since it was laid down by Chancellor Kent, and the substitution of the doctrine of *Swift v. Tyson*, 16 Peters, 1. Hereafter in New York an antecedent indebtedness will be regarded as a valuable consideration, and will protect the holder against latent equities. The law as to notes payable on demand has also been altered. Hitherto a demand note in New York has been a continuing security, on which indorsers remain liable until an actual demand, the holder not being chargeable with neglect to make demand within any particular time. According to the statute the holder must make demand within a reasonable time.

It is believed that, all things considered, the Negotiable Instruments Law is an admirable piece of legislation, and would result, if generally adopted, in greatly facilitating commercial transactions. Moreover, this statute is but a test measure, and if the commissioners are successful in securing its enactment in most of the States, they purpose making still further efforts in the direction of uniformity in our laws.

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LEGAL CRUELTY — RUSSELL CASE. — The case of *Earl Russell v. The Countess Russell*, recently decided in the House of Lords (London Times, July 17th, 1897), fixes the law of England upon the vexed question of what constitutes cruelty as a ground for judicial separation *a mensa et thoro*. A decree of separation had been granted to Earl Russell, the jury having found cruelty in the charges maliciously made and repeated by his wife, accusing him of unnatural crime. The Court of Appeals reversed the decree, holding that there was no evidence of legal cruelty to go before the jury; this decision was finally affirmed in the House of Lords by a vote of five to four, the Lord Chancellor dissenting.

The ground of the decision was that the infliction of mental suffering cannot constitute cruelty in the legal sense unless it endangers the life or health of the person injured. This was undoubtedly the definition of *sævitia* known to the canon law and handed down by the ecclesiastical courts. *Holmes v. Holmes*, 2 Lee, Eccl. Rep. 116. If the question must be considered merely on an historical basis, the decision of the House of Lords is correct; most of the cases in this country agree with it. *Marks*

v. *Marks*, 64 N. W. Rep. (Minn.) 561. In English decisions throughout this century, however, there has been an increasing number of dicta questioning the accepted rule, which Lord Herschell in his majority opinion fails to explain adequately. *Durant v. Durant*, 1 Haggard, Eccl. Rep. 733; *Paterson v. Paterson*, 3 H. of L. Cas. 308. Marriage and the relations arising from it form perhaps the one class of cases where the historical argument is of the least value; it must be remembered that this argument carried to its full length would require us to consider a married woman in the light of a slave.

History is not sufficient for a solution of the present difficulty. No more to the purpose are the general considerations borrowed from the law of torts, where mental injury alone cannot form a ground for recovery of damages. Actions of tort, with few exceptions, are based upon material injury to the plaintiff; the present action, on the other hand, deals with injury to the complex and delicate relations arising from the status of husband and wife; and it seems antiquated and superficial to hold that this status may not be violated without endangering life or health. It would be difficult to dispute the propriety of the position taken by the Supreme Court of New York in the case of *Lutz v. Lutz*, 9 N. Y. Supp. 858, that persistent malicious accusations made by a husband against his wife's chastity in the presence of her children was an exquisite refinement of cruelty worse than physical torture. The majority of the House of Lords meet this argument by saying that such treatment would injure the wife's health, and would thus come within their definition. But it is not extravagant to contend that this treatment is cruelty in itself, without regard to its consequences; and this doctrine, which is maintained by the minority in the present case, may well become the law in jurisdictions where the question is still *res integra*.

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EVIDENCE OF OTHER CRIMES THAN THE ONE CHARGED. — The case of *People v. Zucker*, 46 N. Y. Supp. 766, recently decided by the Supreme Court of New York, suggests, if it does not actually raise, an interesting and difficult point in the law of evidence. At the trial of the defendant for arson, consisting in the burning of a building in New York, the judge allowed the government, for the purpose of corroborating its principal witness, to put in evidence tending to prove that the defendant was guilty of previously wilfully setting fire to a building in Newark, N. J. The Supreme Court, by a vote of three to two, held that this was not reversible error. The material facts were as follows. The furniture in the New York building had been removed to that in Newark, the fires took place within three days of each other, and the motive in both cases was to defraud the insurance companies. Relying on these facts the majority held that the two crimes were part of one and the same scheme, each being the supplement of the other, and neither being complete alone. The minority, in the able opinion of Ingraham, J., deny that the two crimes were connected otherwise than as crimes of a similar nature committed for a similar purpose.

The decision of the majority, on their interpretation of the facts, would seem to be sound. Evidence of a previous crime connected with the actual commission of the one charged, in the sense of making the latter easier, safer, or more effective, was admitted in *Commonwealth v. Robinson*, 146 Mass. 571, and the principle is recognized in *People v. Sharp*, 107



N. Y. 427, 466. And in this connection may be repeated the example often given, that where one commits larceny of a weapon with which to do murder, evidence of the larceny may come in during the murder trial. The point raised by the minority opinion, however, presents a more difficult question. May evidence of crimes other than the one charged and unconnected with it, but of a precisely similar nature and done for a precisely similar purpose, be admitted to prove the crime charged, if not unreasonably separated in time? It is necessary to understand exactly the limits of the problem. Acts such as are suggested in the question certainly come under the general description of acts done for a common purpose. It is to be noted, however, that the ultimate purpose or result is not the final crime, the one for which the defendant is being tried, but a fixed and constant quantity outside of all the crimes, and having an equal influence on each. In *People v. Zucker*, *supra*, for instance, the constant quantity is the scheme to obtain insurance money generally; the similar acts are wilfully setting fire to buildings insured. Evidence of the sort under consideration has been admitted to show intent where it determines the nature of the specific act; as whether false representations were made knowingly or not; *Reg. v. Francis*, L. R. 2 C. C. R. 128; or whether a building was fired by design or accident; *Commonwealth v. McCarty*, 119 Mass. 354. Should it ever come in as tending to prove the crime itself by means of bringing out more strongly the probable motive when there is no question as to the character of the act? The rule that what merely tends to show the defendant to be a bad man, likely to commit crime, is inadmissible, rests on obvious considerations of justice, and is not to be questioned. Whether evidence of similar acts, near in point of time, unconnected with each other, but all traceable to the one fixed purpose, must be always rejected as falling under this general rule, is in the present state of the authorities worthy the serious consideration of those who try criminal cases.

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HABEAS CORPUS — FEDERAL AND STATE JURISDICTIONS. — A striking illustration of the apparently violent conflict that must occasionally arise between two jurisdictions covering the same territory, as our State and Federal courts cover almost every part of the territory of the United States, is afforded by the case *In Re Waite*, 81 Fed. Rep. 359, decided this summer in the District Court of Northern Iowa. A duly authorized pension examiner was indicted in the Iowa courts, under a statute of that State, for threatening to prosecute a person for perjury in order to compel him to sign certain papers. He was convicted; and the decision was affirmed by the Iowa Supreme Court. On his petition to the District Court, the Federal judge issued a writ of *habeas corpus* for his release from custody by the State authorities. This nullification of a decision of the highest court of a State by the summary action of a single judge in the lowest grade of the Federal courts, was justified upon the principle that the courts of the United States have jurisdiction over all acts committed by Federal officers while engaged in the performance of their duties under the laws of the United States. The acts complained of being apparently committed by this pension examiner in the general course of his duties, the question whether they were really justified by his authority, it was declared, ought to be judged only by the Federal courts. Such an assertion of this principle as the issue of the writ of *habeas corpus* in this case would probably have startled the framers of the Constitution. Yet the

process by which this result has been reached is only one out of many instances in which that instrument has been made to furnish all the authority necessary for the exigencies of the national government. Under the clause declaring that the judicial power of the United States extends "to all cases arising under the Constitution, the laws of the United States," etc., the Supreme Court has asserted in several decisions the jurisdiction of the Federal courts in all cases where the acts in question were done by an officer in the course of the performance of his duties under the laws of the United States. In *Tennessee v. Davis*, 100 U. S. 257, for instance, a prosecution of a revenue officer for a homicide done in the course of the performance of his duty was removed from the State to the Federal courts. The celebrated case *In Re Neagle*, 135 U. S. 1, which was a *habeas corpus* case, went further than this, or than the decision of *In Re Waite*, *supra*, inasmuch as the provision of the statute allowing the use of the writ in cases where "the party is in custody for an act done in pursuance of the Constitution and laws of the United States," etc., was extended to a case where the act was not done in pursuance of an express provision of the Constitution or a statute, but only under authority implied from the general powers conferred on the branches of the government.

It might seem that in all these cases a writ of error to the Supreme Court of the United States, after trial by the State courts, would have secured to the defendant the proper adjudication of his justification under the laws of the United States, and avoided conflict with the State courts; yet in actual experience it has proved necessary, in order to prevent the national government from being seriously hampered, even to temporary extinction, by possibly hostile State authorities imprisoning its officials, to remove such cases immediately and entirely from the control of the State courts. Whether this is done on the ground that the State courts can have originally no jurisdiction over such cases, as is declared in *Re Waite*, or on the ground that the United States courts have a paramount jurisdiction by which they can at any time displace the jurisdiction of the State courts, is perhaps hardly material, from a practical point of view. Such a proceeding must always look like a strong measure, yet will always be admitted to justify itself when perceived to be necessary for the existence of the national government.

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**TAXATION OF WATER POWER.** — In the case of *Union Water Power Co. v. City of Auburn*, 37 Atl. Rep. 331 (Maine), the Supreme Court of Maine has recently decided that water power, as such, is not appurtenant to the land on which it is created, and hence cannot be taxed there. The court holds that, as the water is not property, and hence not taxable in itself, the power created by damming it is a mere "potentiality," and is to be taxed only "indirectly, in the valuation of the mill with which it is used." This case seems to be supported by the early Massachusetts case of *Boston Mfg. Co. v. Newton*, 22 Pick. 22, to which the court refers, and is in accord with what seems to be the trend of Massachusetts opinions upon this point. In spite of this authority, however, and of the reasoning of the court, the dissenting opinion of Emery, J. seems to be better law.

The first argument of the court is that it is impossible to tax the water power where created, because there is nothing there to tax; it can be



got at only when it manifests itself, so to speak, by turning machinery, and thereby becoming the main element in determining the value of a mill. The second argument is one of expediency; that to hold otherwise would throw into confusion the whole system of taxation. The simple answer to both these arguments is that they may be shown by a common sense view of the facts to rest on no sound basis. If the owner of a piece of rocky land beside a stream erects a dam whereby he creates a head of water, it seems plain that the value of his land is enhanced by it. He could sell it for more in the market; it is worth more to him if he wishes to use it for himself. Whether this be called the creation of a potentiality or not, the simple fact is that his land is worth more because it has a good water power. This being so, there is no reason why the land thus increased in value should not be taxed correspondingly. If a lot were increased in value by the discovery of petroleum wells, it would surely be no objection to the imposition of an increased tax to say that the petroleum was carried fifty miles away in pipes before being consumed. Nor would it be any more conclusive to argue that because the value of the plant using this cheaper fuel was thereby increased, that of the land whence the fuel came could not also be increased. It is just here that we find an answer to the second argument also. There is no reason why the building of the dam, at the same time that it increases the value of the land on which it is situated, should not likewise, by furnishing cheaper or more abundant motive power to a down-stream factory, raise the taxable value of the latter. This point seems to have escaped the attention of the court. It seems, however, to offer a satisfactory solution of the difficulty, and is one of the grounds on which a decision opposed to that of the Maine court was reached by the New Hampshire court in *Mfg. Co. v. Gifford*, 64 N. H. 337.

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WHAT CONSTITUTES CHAMPERTY. — The Supreme Court of the United States has recently given a decision in *Peck v. Henrich*, 173 Sup. Ct. Rep. 927, upon the interesting point, not often raised, as to what constitutes champerty. In this case, the title to a piece of land was conveyed to the plaintiff as trustee; all costs of obtaining possession of it were to be borne by him; and in the event of its being obtained the trustee was to receive  $3\frac{1}{3}$  per cent of the proceeds "after paying all expenses, costs, and expenditures" out of his share. The decision of the court that this agreement is champertous seems plainly right. According to Blackstone, 4 Commentaries, 124, and also the later cases, such as *Ry. Co. v. Brady*, 57 N. W. Rep. 767 (Neb.); *Land Co. v. City of Superior*, 67 N. W. Rep. 38 (Wis.), there are three elements necessary to constitute the offence. First, and this is common to all forms of maintenance, the absence of any other interest in the case on the part of the champertor than that arising from his champertous contract; second, the assumption by the champertor of all expenses in conducting the case; third, a previous agreement for his remuneration from the proceeds of the suit. The present case combines these three elements.

The general ground upon which the legal condemnation of champerty rested, and still rests, is that of public policy. It may be questioned, however, if the common law offence of champerty, as we know it to-day, whether regarded from an historical or from a practical point of view, deserves to be considered as a living part of the law. Historically, the



nature of the offence, the evil against which the law is directed, have in large part changed. If the language of the statute of 1 Ed. III. c. 14, and of Hawkins, 1 C. P. 462, sec. 38, is to be regarded, it seems that originally the taint of champerty was not due to any feeling that there was evil in the increase of lawsuits *per se*. It was owing to the fear that the purchasing and conducting of suits "by a great man of the realm" would have a "manifest tendency to oppression." To-day oppression, or illegal influencing of the courts, is out of the question, and the condemnation of champerty arises, as the tone of the case under discussion shows, from the feeling that it is undesirable for the courts to be annoyed by the multiplication of suits brought by persons with no interest of their own.

Admitting, however, that champerty, in its changed modern significance, is still objectionable, of what practical efficacy is the law of champerty as it stands to-day? Owing to the need of combining the three elements above mentioned, the question of whether or not an agreement is to be held champertous seems one of terminology. On the authority of this present case, a contract providing that an attorney is absolutely to receive 33 $\frac{1}{3}$  per cent of the gain resulting from the suit is champertous, provided the other two elements be present. An agreement which reads that the attorney shall receive a fee contingent on and proportioned to the amount recovered is free from this taint. *Ramsey v. Trent*, 10 B. Mon. (Ky.) 341; *Major v. Gibson*, 1 Patt. & H. 48. Such being the case, it would seem that, to an attorney bent upon carrying out an affair of this nature, the law in regard to champerty would prove no great obstacle.

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ACCORD AND SATISFACTION. — In the recent case of *Clayton v. Clark*, 21 So. Rep. (Miss.) 565, the Supreme Court of Mississippi has rejected the authority of the much quoted dictum in *Pinnel's Case*, 5 Rep. 117a, to the effect that a lesser sum cannot be satisfaction for a larger debt already due. The exact nature of the case under consideration is not made quite clear; but it seems that the defendant paid a smaller sum for a larger debt then payable, and that the plaintiff accepted it in full satisfaction of the debt. This is the construction put upon it by the court; and thus the question popularly supposed to be involved in *Pinnel's Case*, is directly raised.

The last important case which purported to pass authoritatively on the present question was *Foakes v. Beer*, L. R. 9 App. Cas. 605; but between that case and this there is an important distinction. There a smaller sum of money was paid in consideration of a promise by the creditor not to sue on the debt, and that was held not to create a binding contract. The cases cited in support of the decision were of the class in accord with the dictum in *Pinnel's Case*. That dictum, it is suggested, involved a different question from that in *Foakes v. Beer*, where the smaller sum was not paid in satisfaction of the debt. It was a new act to which the doer was not previously bound, done in exchange for a new promise; this was as true as if, while the debt existed, the smaller sum had been paid for a promise to convey a house, for instance. The transaction was distinct, and had no effect upon the debt itself. There would seem to be no reason why it should not have been held a valid contract, as in the parallel case of *Reynolds v. Pinhowe*, 1 Cro. Eliz. 429; and it is possible that it was held invalid only by reason of a false analogy.

It is evident then that the support given by *Foakes v. Beer* to the principle stated in *Pinnel's Case* was merely by way of dictum; and little other modern authority is to be found. Yet the principle has been sanctioned by lawyers of such eminence as Yelverton, Lord Coke, and Lord Ellenborough; it is supported by a few cases directly in point, and has been assumed in innumerable decisions. *Richards & Bartlett's Case*, 1 Leon. 19; *Fitch v. Sutton*, 5 East, 230. The lack of direct authority upon the point is to be explained mainly by the fact that it was not disputed. The courts in this country have shown little disposition to question the principle, and a conservative observer would declare that it had won its place in the common law.

It cannot be denied, therefore, that the Mississippi court has ignored authority. If, however, this neglect can be condoned, it must be admitted that a healthy conclusion has been reached. There is much force in Lord Blackburn's view (see *Foakes v. Beer*, *supra*) as to the possible benefit to the creditor who accepts the smaller sum, especially if the debtor is in danger of insolvency. Moreover, an analogy may be drawn with the rule of the law of contracts, whereby one party who has waived performance by the other is estopped from complaining of the consequent breach. There seems to be no reason for making a distinction when instead of a contract obligation there is a debt, and the creditor waives payment as to a part of it by accepting the smaller sum in full satisfaction. He should not afterwards be heard to complain of the non-payment of the remainder.

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THE PLEDGEE OF NEGOTIABLE PAPER AS A BONA FIDE PURCHASER. — In a recent Montana case, *Yellowstone National Bank v. Gagnon*, 48 Pac. Rep. 762, it was held, in accordance with the established rule, that where the maker has a good equitable defence against the payee of a note, the indorsee before maturity, taking the instrument as collateral security for a debt of the indorser, is a *bona fide* purchaser only to the extent of the debt secured. Upon similar principles, a note given by a principal as indemnity to his surety is enforceable only to the extent of the surety's payments. The courts also hold that, where paper is pledged by the party accommodated, the accommodating maker or acceptor is responsible only for the amount of the pledgee's claim against the pledgor. 2 Ames's Cases on Bills and Notes, 20.

It is conceived that the pledgee, in such a case as *Yellowstone National Bank v. Gagnon*, *supra*, being the legal holder of the instrument, would be entitled at common law to recover its whole face value. Yet, were this allowed, the pledgor would at once recover from the pledgee the amount in excess of the obligation secured, and the pledgor, in turn, would be compelled to pay over the money to the maker. It is to prevent this triple circuitry of action that the law allows the maker a purely equitable defence to the action by the pledgee. The case would clearly be different, however, had the maker no defence against the pledgor. Under such circumstances the pledgee not only has the legal title to the paper, but cannot be met by the plea of circuitry of action. He is permitted, therefore, to recover the full face value of the instrument, holding the amount in excess of his claim against the pledgor as the latter's trustee. If this were not the law, the maker might suffer the injustice of being subjected to two actions in regard to the same matter, — one by the



pledgee for the amount of his claim against the pledgor, and the other by the pledgor for the balance. In any event the law results in no hardship to the pledgee, for he is fully protected to the extent of the pledgor's obligation in his favor.

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**GREAT ENGLISH JUDGES — EXCHEQUER.** — From 1834 to 1855 the ruling power in the Court of Exchequer, and indeed the dominant figure of the English bench, was Sir James Parke, afterwards Baron Wensleydale. He was born at Highfield, near Liverpool, in 1782, and was educated at the grammar school of Macclesfield, and at Trinity College, Cambridge. After studying with a special pleader, he was called to the bar at the Inner Temple, where his career, though not brilliant, was creditably successful. In 1828 he was appointed to the King's Bench, and knighted; in 1833 he was sworn of the Privy Council, and the next year was transferred to the Exchequer. Baron Parke ranks as one of the greatest of English judges; had he comprehended the principles of equity as fully as he did the principles of the common law, he might fairly be called the greatest. His mental power, his ability to grasp difficult points, to disentangle complicated facts, and to state the law clearly, have seldom been surpassed. No judgments delivered during this period are of greater service to the student of law than his. He had, perhaps, too great respect for authority, and was rather too much disinclined to go against a previous decision. He is reported to have said, "I think a solemn judgment should refer to every case on the subject." His detractors, of whom perhaps the chief was the late Lord Coleridge, accuse him also of an absurd devotion to the forms rather than to the substance of law. The classical remark attributed to him is, "Think of the state of the record!" But though as a complete master of the subtleties of special pleading he stands as the great exponent of that perhaps too exacting system, it may be questioned whether his efficiency as a judge was in this wise materially impaired. Baron Parke resigned from the Exchequer in disgust with the Common Law Procedure Acts of 1854 and 1855. The next year he was raised to the peerage; to the end of his life he took part in the legal deliberations of the House of Lords. He died at his seat in Bedfordshire in 1868 at the age of eighty-five.

Baron Parke was succeeded in the Exchequer by Sir George Bramwell, later Lord Bramwell. The herald and chief exponent of reform in the conduct of the law courts, and standing, in popular estimation at least, for diametrically opposed ideas, Baron Bramwell resembles his illustrious predecessor in that, like him, for years he was the great judge in the Court of Exchequer. He was born in London in 1808, and was educated at a private school in Enfield. After spending some time in his father's London bank, he studied special pleading under Mr. Fitzroy Kelly, later Chief Baron. Finding this branch of the law neither congenial nor profitable, he resolved to be called to the bar, where, after a few years, he acquired a large practice. Never a brilliant nor an eloquent speaker, his success was due largely to his simple and convincing manner in talking to juries. He was made Queen's Counsel in 1851. He was appointed by Lord Cranworth one of the commissioners to inquire into the working of the common law courts, with which at this time there existed general dissatisfaction. His investigations in this behalf and subsequent recommendations, together with those of Mr. Willes, were largely responsible for the



substance of the Common Law Procedure Acts of 1854 and 1855. The distinguishing feature of Baron Bramwell's judicial character was sound common sense. This and the added advantage of a business training made his decisions in the field of mercantile law second to those of no other English judge. He was singularly successful at *Nisi Prius*, seeming always to be on terms of perfect mutual understanding with the jury. Especially admirable was his conduct of criminal cases. Few guilty men tried before him escaped; but it has been said that "to any man in danger of suffering from unfairness, to have Sir George Bramwell on the judgment seat was better than to have enlisted the services of the best advocate at the bar." In 1876 he was made a Lord Justice of Appeal, and on his retirement was raised to the peerage. He took an active part in the proceedings of the upper house, combating vigorously all kinds of "paternal legislation." He died at his home in Edenbridge, Kent, in 1892. Baron Bramwell was great because of his force of character, and Mr. Dicey, who compares him to Dr. Johnson, has well written, "He was manly in the best sense of the word, simple and natural."

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## RECENT CASES.

**ADMIRALTY — GENERAL AVERAGE.** — Owing to a severe storm, a tug towing barges cut them adrift for the purpose of saving itself, so that they were lost. *Held*, that the tug was not bound up with the barges into a single maritime adventure so as to be subject to the law of general average. *The J. P. Donaldson*, 17 Sup. Ct. Rep. 951, reversing 21 Fed. Rep. 671.

The case presents a novel and interesting application of the law of general average. The Supreme Court agrees with the lower court in that the sacrifice must be made for the benefit of the common adventure. 2 Arnould on Ins., 5th ed., 813. But it holds that the adventure is not common. The reasoning is that, as the tug is not a common carrier (*The Burlington*, 137 U. S. 386), there is no such bailment of the barges as to authorize the captain of the tug to cut them loose. This common law distinction in admiralty law is at least suspicious. The court relies on the case of *Ralli v. Troop*, 157 U. S. 386, for a criticism of which case see article on General Average, by Judge Lowell, 9 HARVARD LAW REVIEW, 185.

**AGENCY — FELLOW SERVANTS — SAFE APPLIANCES.** — One of the defendant's employees, in charge of a barrel used for heating water by means of steam, negligently left a plug in the escape pipe, where it had been put a month before, when the apparatus was being used for cold water. When the steam was turned on, the barrel exploded, injuring plaintiff, another employee. *Held*, that defendant was not liable. *Crowell v. Thomas*, 46 N. Y. Supp. 137.

It is doubtful whether this act of negligence should be regarded as a failure by the employee to keep the apparatus in a safe condition, or merely as a careless performance of one of his regular duties. Unfortunately, the court do not discuss this question. The former seems the more reasonable view of the facts, in which case the decision is wrong. The master is obliged to use ordinary care to keep machinery in a safe condition, and is not relieved from that obligation by delegating the management of the machine to a servant. See *Corcoran v. Holbrook*, 59 N. Y. 517; *Moynihan v. Hills Co.*, 146 Mass. 586.

**AGENCY — RATIFICATION.** — *Held*, that a forged instrument cannot be ratified. *Henry Christian Building & Loan Association v. Walton*, 37 Atl. Rep. 261 (Pa.).

This is in accord with the weight of authority. *Brook v. Hook*, L. R. 6 Ex. 89; *Workman v. Wright*, 33 Ohio St. 405; *Shisler v. Vandike*, 92 Pa. St. 447; *contra*, *Greenfield Bank v. Crafts*, 4 Allen, 447. The great objection to the Massachusetts view, expressed in the last mentioned case, is that the forger does not purport to act for anybody. He professes to be the person whose name he signs. It is difficult to

see how this personation can be turned into an agency by any means. Of course, the person whose name is signed may so act as to be estopped to deny that he signed it himself; but that is entirely distinct from a ratification.

**BILLS AND NOTES — BONA FIDE PURCHASER — PLEDGE.** — *Held*, that where the maker has a good equitable defence against the payee of a note, the indorsee before maturity, taking the instrument as collateral security for a debt of the indorser, is a *bona fide* purchaser only to the extent of the debt secured. *Yellowstone National Bank v. Haggon*, 48 Pac. Rep. 762 (Montana). See NOTES.

**CONSTITUTIONAL LAW — DISTRIBUTION OF POWER OF GOVERNMENT — JUDICIAL POWERS.** — The Constitution of Connecticut provides that the power of government shall be divided into three distinct departments. An act of the Legislature provided that before any railway company should construct its roads in the streets of a city, the city authorities, or the Superior Court, or a judge thereof, on appeal, should approve the plan of construction. *Held*, that the power which the Superior Court, or a judge thereof, was required to exercise was legislative, and not judicial, and therefore could not be exercised by them. *Appeal of Norwalk St. Ry. Co.*, 37 Atl. Rep. 1080 (Conn.).

How far the judiciary may exercise functions which in themselves are not purely judicial is a question much discussed. The principal case is an interesting one in this connection.

**CONSTITUTIONAL LAW — FEDERAL JURISDICTION.** — An officer of the United States is not liable to a criminal prosecution in the courts of a State for acts done by him in the course of his duties under the laws of the United States; and a writ of *habeas corpus* will be issued by a Federal court to release him from the custody of the State authorities. *In re Waite*, 81 Fed. Rep. 359. See NOTES.

**CONTRACTS — ACCORD AND SATISFACTION.** — A smaller sum paid and accepted in satisfaction of a debt already matured operates to discharge the debt. *Clayton v. Clark*, 21 So. Rep. 565. See NOTES.

**CONTRACTS — ATTORNEY AND CLIENT — CHAMPERTY.** — *Held*, that an agreement whereby an attorney was to pay all the costs of conducting a suit, and was to receive 33½ per cent of the proceeds as his fee, is champertous and void. *Peck v. Henrich*, 173 Sup. Ct. Rep. 927. See NOTES.

**CORPORATIONS — ESSENTIAL ATTRIBUTES.** — A Pennsylvania statute provides that a "partnership association" may be formed with shares transferable on certain conditions, and limited liability for debts; that the business shall be conducted by a board of managers; and that such association shall buy and sell land, and sue and be sued, in the association name. *Held*, that an association formed under this statute is not a corporation. *Edwards v. Warren Linoline & Gasoline Works, Limited*, 47 N. E. Rep. 502 (Mass.).

The court inclined toward a different decision, but considered the question settled in Massachusetts. The authorities generally are irreconcilable as to the essential attributes of a corporation. The best guide to the essence of a corporation is the reason for the existence of such an institution. The obvious reason why individuals combine and apply to the legislature for corporate rights is that they wish to act as a body in certain business matters. It is the legislative authority to act collectively which is the essential attribute of a corporation; it is the only one common to all. Attributes such as limited liability and continuous succession seem to be merely incidental reasons for the existence of some corporations. Corporations can exist without them, hence they are not essential. If legislative authority to act collectively is the essential attribute of a corporation, and if, as is universally admitted, the name "corporation" is immaterial, then every body of men having this legislative authority is a corporation. See opinion of Hand, Senator, in *Gifford v. Livingston*, 2 Denio, 395-398.

**CRIMINAL LAW — INSANITY AS A DEFENCE.** — *Held*, that where insanity is set up as a defence to an indictment for murder, unless it appears that the prisoner was not conscious, at the time of the killing, that the act which he was doing was morally wrong, he is responsible, even if it be shown that he was impelled to its commission by an irresistible impulse. *Gens v. State*, 37 Atl. Rep. 69 (N. J.).

The court here accepts fully the rule of *McNaghten's Case*, 10 Cl. & F. 200, as applied in *State v. Spencer*, 21 N. J. Law, 196, and followed in New Jersey, as the court says, for fifty years. This test of criminal responsibility on the part of insane persons was, at its inception, in accordance with the teachings of medical science, but has long been outgrown. It is now wholly untenable, and should be given up in spite of the rule of *stare decisis*. The best discussion of the subject is by Judge Somerville, in *Parsons v. State*, 81 Ala. 577. His argument against retaining the old test would seem to be conclusive, though the authorities in this country are still about equally divided.



**DAMAGES — LIABILITY FOR GRATUITOUS MEDICAL SERVICES.** — In an action for personal injuries caused by defendant's negligence, *held*, that the plaintiff can recover for the value of the services of the doctors and nurses, and it is immaterial whether plaintiff will ever have to pay for such services. *Denver & Rio Grande R. R. Co. v. Lorentzen*, 79 Fed. Rep. 291.

If the true rule as to such damages is that plaintiff shall recover only for the expense to which he is actually put, this decision is wrong. This was the view taken by the court in *Peppercorn v. Black River Falls*, 61 N. W. Rep. 79 (Wis.). But this is open to the objection that under such a rule the friends of the plaintiff would be treated as giving their services, not to the plaintiff, but to the wrongdoer. The proper view, and the one sustained by the weight of authority, would seem to be that these services have been necessitated by defendant's wrong, and the defendant should pay for them. The plaintiff is the proper person to be paid for them, since they were rendered for him. That they cost him nothing is immaterial. He recovers, not for their cost, but for their value. *Brosnan v. Sweetser*, 127 Ind. 1.

**DAMAGES — MEASURE OF DAMAGES IN EXECUTORY CONTRACT OF SALE.** — A agreed to sell certain boilers to B, a corporation, of which C was the agent and largest stockholder. The goods were afterwards damaged. A refused to deliver except at the original price, and resold to a third person. C bought them on his own account. The cost of repairing was slight. In an action by B for breach of contract, *held*, that, B having an opportunity through its agent to purchase the boilers and repair them, it could recover only the cost of repairs, under the doctrine that plaintiff must use reasonable care to avoid the consequences of defendant's wrong. *Cunningham Iron Co. v. Warren Mfg. Co.*, 80 Fed. Rep. 878.

The rule relied on seems to have no application. The court allow recovery for the cost of repairs irrespective of the price paid for the boilers, but it is difficult to see why B should be under any duty to buy the boilers and repair them. C's transaction has no connection with the original contract, and, even if it were for B's benefit, any profit made out of it should belong to B, and not to the wrongdoer. *Wolf v. Studebaker*, 65 Pa. 459. The true measure of damages for breach of contract is the value of the contract which, in a case like the present, is the difference between the contract price and the value of the goods at the time and place fixed for delivery. Where there is a market price, that is usually taken as the best evidence of value, but it is not conclusive. 2 Sedg. on Dam., 8th ed., § 734 *et seq.*

**EVIDENCE — COMPETENCY — GRAND JURORS.** — *Held*, that a grand juror may be required in a court of justice to disclose testimony given before the grand jury, though the testimony so disclosed is to be used for purposes other than the impeachment, or trial for perjury, of a witness. *Hinshaw v. State*, 47 N. E. Rep. 157 (Ind.).

This case departs from the common law rule which protected the proceedings of the grand jury, except for the purposes referred to above. *State v. Fassett*, 16 Conn. 457. The reasons for keeping secret the grand jury's proceedings are, first, to insure free disclosures to and discussion by the grand jury; secondly, to prevent perjury and subornation of perjury by keeping the evidence secret; thirdly, to prevent the escape of the accused by keeping the indictment secret. *Commonwealth v. Mead*, 12 Gray, 167. In the later cases, the general opinion seems to be that these reasons are outweighed when in the opinion of a court justice demands the disclosure of the proceedings. It is a matter which depends largely on precedent, but the tendency is toward the broader rule, with the limitation that it may not be shown how the individual jurors voted, or what they said in their deliberations. *U. S. v. Farrington*, 5 Fed. Rep. 343. It seems obvious that many reasons for permanent secrecy as to proceedings of a petit jury do not apply in the case of the grand jury.

**EVIDENCE — PROOF OF OTHER CRIMES THAN THAT CHARGED.** — On trial of defendant for arson of a building in New York, *held*, that evidence tending to prove the defendant guilty of arson of a building in New Jersey was admissible to corroborate one of the government's witnesses. *People v. Zucker*, 46 N. Y. Supp. 766. See NOTES.

**EVIDENCE — QUESTION — COMPETENCY.** — *Held*, that a witness may be asked, on cross-examination, if he has not been indicted for crime. *Clark v. State*, 40 S. W. Rep. 992 (Tex.).

This question has given rise to a considerable difference of opinion. While it is largely a discretionary matter, the better view seems to be that such questions are admissible. *Clemens v. Conrad*, 19 Mich. 174. It is only by investigation of this sort that the jury can learn what manner of man is testifying. It can hardly be supposed that a witness will testify to an indictment against himself which never existed, and if



he was wrongly indicted he is allowed to explain the circumstances. While it is true that an indictment is matter of record, the rule that such matter should be proved by the record cannot properly be applied to admissions made by a witness under cross-examination on collateral matters. *Thompson on Trials*, § 467.

**EVIDENCE — RAPE — PARTICULARS OF COMPLAINT.** — *Held*, that, in a prosecution for assault with intent to commit rape, evidence of the particulars of the complaint made by the prosecutrix to her husband some hours after the alleged commission of the offence are inadmissible. *Harmon v. Territory*, 49 Pac. Rep. 55 (Ok.).

In all cases of prosecution for rape, it is important to show that the prosecutrix subsequently made complaint; otherwise the suspicion arises that there was consent. Accordingly, many courts have followed the principal case, in holding that the fact of complaint might be shown, but not the particulars thereof. The reason for this distinction has never been clear. In *Reg. v. Walker*, 2 Moo. & R. 212, Baron Parke, while following the prevailing usage, said that he had never been able to understand the reasons for it, and that "the sense of the matter certainly was that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she then said." This more rational view has been adopted in a recent English case, *Reg. v. Sillyman*, 74 L. T. Rep. 730, and by some American courts. *Johnson v. The State*, 17 Ohio, 595; *State v. Kinney*, 44 Conn. 153.

**MORTGAGES — MERGER.** — *Held*, that, where a lease for years and an equity of redemption come into the same hands, the legal estate may merge in the equitable, if the parties apparently so intended. *Hudson, etc. Co. v. Glencoe, etc. Co.*, 41 S. W. Rep. 450 (Mo.).

This is a direct departure from the generally accepted rule that a legal estate cannot merge in an equitable, *Little v. Ott*, 3 Cranch C. C. 416, and can be justified on no principle. It may be explained as part of the policy in many States of making a "fusion" of law and equity in mortgage cases, and treating the mortgagor's rights for some purposes as legal. This "fusion" usually results, as in the principal case, in a disregard of both legal and equitable principles.

**PERSONS — INFANCY — ESTOPPEL.** — In an action to foreclose a mortgage, *held*, that the defendant was not estopped from denying his infancy, because he had falsely represented himself to be of age and thereby induced the plaintiff to make the contract. *New York Building Loan Banking Co. v. Fisher*, 45 N. Y. Supp. 795.

The case is undoubtedly supported by the weight of authority. *Bigelow on Estoppel*, 5th ed., 605; *Merriam v. Cunningham*, 11 Cush. 40; *Alvey v. Reed*, 114 Ind. 148; *Burley v. Russell*, 10 N. H. 184, accord. *Kilgore v. Jordan*, 17 Tex. 341, *contra*. In general, an estoppel would be raised wherever an action of deceit would lie; but even in jurisdictions where such an action against the infant is allowed, (*Fritts v. Hall*, 9 N. H. 441.) the courts have not gone so far as to allow the contract to be enforced. Their refusal is grounded upon public policy. The result is that because of the fraud the party should have a right to rescind the contract, and should then be left to an action of tort. 1 *Story on Contracts*, 5th ed., § 111.

**PERSONS — MORTGAGE BY INFANT — DISAFFIRMANCE.** — A minor used the proceeds of a loan, secured by his trust deed upon certain real estate, in paying off prior encumbrances and in making substantial improvements on the property. At majority the minor, still holding the property, disaffirmed the trust deed. *Held*, that the lender could enforce the security to the extent of the encumbrances satisfied out of the loan, with interest, and also the remainder of the loan used in the improvements, in case there was any balance after the infant was paid the value of her equity in the property without the improvements. *MacGreal v. Taylor*, 17 Sup. Ct. Rep. 961.

For the decision in the court below, see *Utermehle v. McGreal*, 1 Tucker's App. Cases, 359. The principal case is important as showing a distinct step toward the adoption of the principle of equity of following money or property into its proceeds. The cases heretofore have inclined to the doctrine that, upon disaffirmance, only the specific *res* received by the infant, if still in his possession, can be retaken by the other party. *Englebert v. Troxell*, 40 Neb. 195; *Hawes v. Burlington, etc. Ry. Co.*, 64 Iowa, 319. The principle of subrogation is also applied in giving the lender the rights of the prior encumbrancers. The court here asserts that an infant, exercising the right of disaffirmance, is justly protected if placed in a position equivalent to the one occupied at the time of making the transaction disaffirmed, but he shall not be allowed to profit. To attain this, substance, and not form, is to be looked at. The decision goes far toward ameliorating the hardships often imposed on adults by a strict adherence to the old law in regard to infants.

PROPERTY — DEED BY AN ATTORNEY. — *Held*, that a deed from one who has power of attorney passes title, although he does not refer to such power and has no estate in the land so conveyed. *Hill v. Conrad*, 41 S. W. Rep. 541 (Tex.).

The case illustrates the rule that the law, regarding the intent of the parties, will not suppose their acts to be in vain, but will carry out the purpose, even if not in the way intended by the parties. The substance and not the form of the instrument is regarded. Powers executed by deed need not refer to the instrument creating the power, if the act to be done can be done only by virtue of the power. *Powell on Powers*, 111, 114; *Allison v. Kurtz*, 2 Watts, 185; *Hough v. Hill*, 47 Tex. 148, accord.

PROPERTY — FIXTURES — RIGHTS OF LESSOR AND OF LESSEE'S MORTGAGEE. — A, the lessee of a mine, executed a mortgage to B of certain mining fixtures. C, the lessor, having recovered possession of the land by summary proceedings for non-payment of rent, it was *held* that this termination of the lease deprived B of his right to foreclose the mortgage. *Massachusetts Nat. Bank v. Shinn*, 46 N. Y. Supp. 146.

The majority of the court say that the lessee could mortgage merely his own right of removal, which right ended with the destruction of the term. Upon similar grounds it has been held that where a lessee for years makes a grant of a growing crop, and subsequently surrenders his term, the grantee cannot claim a right to the emblements. *Debow v. Titus*, 10 N. J. Law, 128. But the better opinion would seem to be that the lessee cannot thus defeat his own grant either by a voluntary surrender or failure to pay rent. *Amos & Ferrard on Fixtures*, 3d ed., 140. So, where a lessee mortgaged his trade fixtures, and subsequently surrendered his term, it was held that the mortgagee retained for a reasonable time after the close of the lease the right to enter and sever the fixtures. *London, etc. Co. v. Drake*, 6 C. B. N. s. 796. The principal case may, perhaps, be supported on the ground that an unreasonable length of time had elapsed between the forfeiture and the mortgagee's attempt to remove the fixtures, and that he was barred by laches.

PROPERTY — PERCOLATING WATER. — A was the owner of land through which ran a brook flowing at all seasons in a defined channel. B, for the purpose of procuring a water supply, cut off the percolating waters which fed the brook, before they reached it, and caused the stream to dry up. *Held*, A was entitled to recover for the damage he had sustained. *Smith v. City of Brooklyn*, 46 N. Y. Supp. 141.

This decision seems opposed to the doctrine of *Chasemore v. Richards*, 7 H. L. Cas. 349, which has been generally followed in this country. See *Cooley on Torts*, p. 580. The court professed to follow *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch App. 483, holding the decision in that case inconsistent with *Chasemore v. Richards*. These cases seem clearly distinguishable, however. *Chasemore v. Richards* stands for the proposition that a landowner may use all the water percolating through his land, before it has reached a well defined channel, while *Grand Junction Canal Co. v. Shugar* decides that a landowner cannot use the water percolating beneath the surface if in so doing he also draws off water which has reached a definite channel.

PROPERTY — TAXATION OF WATER POWER. — *Held*, that water power created by the erection of a dam is not appurtenant to the land on which the dam is erected, and cannot be taxed there; but is to be taxed indirectly in the valuation of the mill with which it is used. *Union Water Power Co. v. City of Auburn*, 37 Atl. Rep. 331 (Me.). See NOTES.

SURETYSHIP — SUBROGATION OF SURETY TO RIGHTS OF CREDITOR. — The surety on a note providing for an additional payment of ten per cent of the amount in case of suit, as attorney's fees, paid the holder the face of the bill without suit. In an action by the surety against the maker, *held*, that equity will keep the note alive, and that the surety is subrogated to the rights of the creditor before payment. Being obliged to bring suit to collect, he is entitled to the ten per cent attorney's fees. *Beville v. Boyd*, 41 S. W. Rep. 670 (Tex.).

Until changed by 19 & 20 Vict. c. 97, s. 5, the English rule was that payment by the surety extinguished the obligation, and the surety could recover only on the collateral contract of indemnity. This rule survives in a few States in this country. *New Bedford Savings Inst. v. Hathaway*, 134 Mass. 69. But the authorities generally favor the view that the obligation still exists in equity for the benefit of the surety. Under this rule the surety could recover whatever the note called for, unless met by some equitable defence, such as that he had taken the note up at a discount. Equity would allow recovery only for the amount actually paid, otherwise the surety would be profiting at the expense of his principal. But, as pointed out in this case, that is very different from recovering attorney's fees, for in the latter case the surety is only making himself whole.



**TORTS—ACTION FOR MUTILATION OF DEAD BODY.**—*Held*, that the father of a child has such a right to its dead body that he may maintain an action against one who, without his consent, performed an autopsy on the dead body. *Burney v. Children's Hospital*, 47 N. E. Rep. 401 (Mass.).

This action, though uncommon, is now well established. For a discussion as to the nature of the right infringed, and for authorities, see 10 HARVARD LAW REVIEW, 51.

**TORTS—CONVERSION BY PLEDGEE.**—A broker who was pledgee of certain securities repledged them without the owner's authority, and for a greater amount than the original pledge debt. *Held*, the broker was guilty of conversion. *Douglas v. Carpenter*, 45 N. Y. Supp. 219.

The report does not state whether the pledgor tendered to the broker the money due; and yet, according to the English authorities, if this tender was not made, the decision is erroneous. *Halliday v. Holgate*, L. R. 3 Ex. 299. Strangely enough, none of these English cases, or of the American cases which lean in the same direction, were mentioned. The *ratio decidendi* of *Halliday v. Holgate* is, indeed, touched upon in the statement that the original pledgor "had the ownership of the securities, but not the right of possession." The court, however, does not follow out this line of thought, and fails to observe that, without the acquisition of this right by means of a tender, the pledgor could not succeed. This is the more remarkable because *Halliday v. Holgate* was apparently approved in an earlier New York decision, *Lewis v. Mott*, 36 N. Y. 395. Under such circumstances, the principal case cannot be deemed satisfactory authority for any proposition.

**TORTS—DECEIT—NEGLIGENCE AS A SUBSTITUTE FOR SCIENTER.**—Defendant, a bank president, having abundant opportunities to know the financial condition of the bank, made statements untrue in fact as to the value of its stock, in order to induce plaintiff to buy some of the stock from a third party, and plaintiff did so buy and was damaged in consequence. *Held*, that defendant was liable, even though he believed his statements to be true, if he had no reasonable grounds for his belief. *Trimble v. Reid*, 41 S. W. Rep. 319 (Ark.).

The first instruction given by the lower court and sustained by the upper court follows a ruling common in American jurisdictions in allowing unreasonableness of belief to take the place of want of belief in an action for false representations. This is directly contrary to the law in England as settled by *Derry v. Peck*, 14 App. Cas. 337, and it is submitted that it is really confounding negligence and deceit. It seems foreign to the nature of the action for deceit to make it supply a remedy for damage due to negligence.

**TORTS—INTERFERENCE WITH BUSINESS.**—*Held*, that an action can be maintained for inducing a third person to break a contract with plaintiff, where the relation of master and servant was not created by such contract. *Glencoe Sand & Gravel Co. v. Hudson Bros. Commission Co.* 40 S. W. Rep. 93 (Mo.).

Plaintiff's business suffered, because defendant, who sold the same kind of goods as plaintiff, threatened to discharge its employees if they traded with plaintiff. *Held* for defendant, as the threats were not wanton but in the course of competition. *Robison v. Texas Pine Land Association*, 40 S. W. Rep. 843 (Tex.).

Plaintiff, as treasurer of a labor organization, refused to act in a manner not required by the constitution and by-laws. As a result of a resolution of the members of the organization, plaintiff's fellow workmen refused to work with him, causing his discharge. *Held*, that he was entitled to recover from the organization the damages thereby sustained. *Connell v. Stalker*, 45 N. Y. Supp. 1048.

These cases will be interesting to those who are investigating the so called "malicious" torts. In the Missouri case the petition demurred to contained no allegation of malice, but the court did not notice the point, and placed themselves squarely against the doctrine allowing recovery for malicious interference with contracts.

**TORTS—NERVOUS SHOCK AND ILLNESS CAUSED BY WILFUL MISSTATEMENT.**—Defendant told plaintiff that her husband was seriously injured, and wished her to send a conveyance for him. In consequence, the plaintiff suffered a violent nervous shock which produced illness. She also expended money in reliance upon the statement. Verdict for plaintiff, assessing damages separately for the illness and for the money expended. *Held*, plaintiff could recover both items. *Wilkinson v. Downton*, [1897] 2 Q. B. 57.

The plaintiff was clearly entitled to recover for money expended; *Pasley v. Freeman*, 2 T. R. 51. Whether the other item was too remote presents a more difficult question. Wright, J. treated the case as one of the first impression. He thought the doctrine of *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222, was not in point, because in that case there was no element of wilful wrong; nor *Allsop v. Allsop*, 5 H. & N. 534,



which was decided largely on the particular form of action. He held, however, that there could be recovery for the illness, on the ground that the defendant had wilfully done an act calculated to cause physical pain to the plaintiff, and pain had, in fact, resulted from his act. In so doing he had infringed her legal right to personal safety.

**TORTS — PROXIMATE CAUSE — BODILY DAMAGE CAUSED BY MENTAL SHOCK.** — *Held*, in an action to recover damages for an injury sustained through the negligence of the defendant, there can be no recovery for a bodily injury resulting from mere fright without impact. *Spade v. Lynn & Boston R. R. Co.*, 47 N. E. Rep. 88 (Mass.).

It is interesting to note the trend of judicial opinion upon this question. The Supreme Court of Massachusetts follows the decisions in *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222, and in *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107. (See 10 HARVARD LAW REVIEW, 387.) While admitting that bodily injury may flow proximately from negligence, causing mental shock, the court justifies its conclusion on the rather unsatisfactory ground that in practice it is impossible to administer any other rule than that there can be no recovery for physical damage caused by mental disturbance, where there is no injury to the person from without.

**TRUSTS — CONSTRUCTIVE TRUST — STATUTE OF FRAUDS.** — *Held*, that a voluntary conveyance by a husband to his wife, without consideration, but with a parol agreement that the grantee shall hold the land in trust for the grantor, does not create a trust which can be enforced. *Fitzgerald v. Fitzgerald*, 47 N. E. Rep. 431 (Mass.).

The basis of the decision is, that, if the land is reconveyed to the grantor, the terms of a parol trust are carried out contrary to the Statute of Frauds, and hence such a parol agreement cannot be shown in evidence. The same principle is laid down in the recent case of *Myers v. Myers*, 47 N. E. Rep. 309 (Ill.). In that case, however, the trustee waived the statute, admitted the terms of the trust in an answer to a bill in equity, and declared himself willing to convey to whomsoever the court should decide to be entitled. The court therefore decided that no one else could set up the statute against carrying out the terms of the trust, but that without such a declaration by the grantee there was no trust capable of proof. It is erroneous to assert that there is no trust which can be proved without violating the Statute of Frauds. The statute expressly excepts trusts arising by implication of law. The express trust of the parties cannot of course be enforced. If, however, the grantee refuses to carry out the express trust, equity should impose on him a constructive trust to reconvey to the grantor to avoid the fraud of the grantee's retaining possession of what in justice he is not entitled to. The same result is reached practically as if the express trust were enforced. This is a mere coincidence, however. It is an implied trust which is enforced, and the parol agreement is admissible to prove it and not the express trust. The English courts have correctly noted the distinction; *Davis v. Whitehead*, [1894] 2 Ch. 133. The conflict in the American courts, *Ryan v. O'Connor*, 41 Ohio St. 368, and *Peacock v. Nelson*, 50 Mo. 256, makes it important to note the distinction.

**TRUSTS — SPECIAL DEPOSIT — INSOLVENT BANK.** — X deposited on June 20 to the account of bank C a specific sum in bank B, the correspondent of C, and directed C to pay the amount by telegram to D. B placed the money to the account of C, but did not send it directly to C. C failed on June 22, without making the payment directed. *Held*, C was a trustee of X, and the money could be recovered as a special deposit. *Montagu v. Pacific Bank*, 81 Fed. Rep. 602.

The decision is sound, but the reasoning is erroneous, arising from a misconception of the trust *res*. The specific deposit lost its identity as a *res* by being mixed with the funds of the bank of deposit. But as soon as C was credited with the amount by the bank of deposit, the former had a claim as a creditor — a common law claim — against the latter. This claim was not extinguished by any actual payment, because, as the report expressly states, no funds were transmitted from B to C. Nor does it appear from the facts that it was extinguished by any settlement on the books of the bank. The brief interval between the date of deposit and the failure, and the general custom of banking, would be quite conclusive that there was no such settlement. This unsatisfied claim would be held in trust for the depositor, who did not affect it by any subsequent withdrawals against it. The form of a trust *res* may change and the trust relation remain, or a new trust *res* may come into existence during a course of events. A failure to distinguish its form and changes has caused great confusion in the cases. A similar correct result, but similar confusion of reasoning, characterizes the case of *Farley v. Turner*, 26 Law J. Ch. 710, cited in the principal case as directly in point. The foregoing reasoning avoids resort to the authority of cases where the assets of a bank are swollen by the intermixture of trust funds, many of which are cited in the principal case.

## REVIEWS.

A TREATISE ON THE CRIMINAL LAW. By Emlin McClain. Chicago: Callaghan & Co. 1897. 2 vols. pp. xlix, 1413.

Compactness and order characterize Professor McClain's new work on Criminal Law. It is a condensed statement of the law of statutory and common law crimes, as the author conceives it to exist at present in the United States. The statement is judicious and clear; but little attempt at analysis is made, so that to a student it must remain a means rather than an inspiration. This lack of analysis, together with a general tendency to look upon the law as a present fact, rather than an historical growth, constitutes the chief shortcoming of the work.

To support these criticisms, the discussion of the anomalous doctrine of continuing trespass in the law of larceny may be cited, § 553; authorities are collected, but no definite conclusion is reached. Again, in regard to the test of insanity, § 165, while the satisfactory rule of *Parsons v. State*, 81 Ala. 577, is supported, it is not even hinted that this rule represents a revolt from the very different rule of *M'Naghten's Case*, 10 Cl. & Fin. 200. Moreover, the treatment of the intricacies of larceny in general, and of larceny by breaking bulk in particular, § 555, would be more adequate if it dealt with the historical growth of the subject; for the principle of a subject cannot be grasped until one has discriminated between what is logical and what is illogical in its development.

In spite of these defects, the work is an admirable general statement of law, with a convenient and complete collection of current authority. It has in its table of contents a good "Analysis" of the subject matter of the chapters, and it has a full index.

J. G. P.

THE LAW OF SALES. By Francis M. Burdick, Professor of Law in Columbia University. Boston: Little, Brown, & Co. 1897. pp. 1, 278.

CASES ON THE LAW OF SALES. By Francis M. Burdick. Boston: Little, Brown, & Co. 1897. pp. ix, 664.

From the point of view of those who believe in the case system of teaching law, every text-book intended mainly for the use of students ought to be accompanied by a collection of cases on the subject treated. In fact, the case-book ought to come before the text-book. Many of the treatises in Messrs. Little, Brown, & Co.'s Students' Series are now accompanied by books of cases. These two volumes on the Law of Sales are the latest issues. The text-book seems very small for the size of the subject; but appears to cover the ground well, its bulk being kept down by the careful selection of references and the omission of a few topics not strictly belonging to the law of sales. The arrangement of the work is particularly good; and there is a valuable treatment of the Factor's Acts. The case-book also is considerably condensed, containing two hundred and sixty-two cases in one moderate volume. This result could only be reached by leaving out great parts of most of the cases. Much is to be said, of course, for printing cases nearly in full, but it would seem that, on the whole, the tendency of recent compilers of case-books for students' use to cut out freely is a wise one. If the cutting is done skilfully, much time is saved, with little loss of profit.

R. G.



THE NEGOTIABLE INSTRUMENTS LAW. By John J. Crawford, of the New York Bar. New York: Baker, Voorhis, & Co. 1897. pp. xx. 144.

THE CODIFIED NEGOTIABLE INSTRUMENTS LAW. Edited by James W. Eaton, of the Albany Bar, and H. Noyes Greene, of the Troy Bar. Albany, N. Y.: Matthew Bender. 1897. pp. 165.

The full text of the Negotiable Instruments Law, as recently enacted by the legislatures of New York, Connecticut, Colorado, and Florida, from the draft prepared by Mr. Crawford for the commissioners on uniformity of laws, is contained in each of these volumes. There are also in each volume full annotations, and a helpful index. The edition of Messrs. Eaton and Greene has, in addition, an appendix containing the New York Interest Laws. Mr. Crawford's book possesses special interest, from the fact that many of the annotations are his original notes to the draft of the act which he submitted to the conference of commissioners. Either volume will be found serviceable, not only by lawyers practising in States which have enacted this statute, but also by the profession generally.

H. D. H.

CASES ON THE DOMESTIC RELATIONS AND THE LAW OF PERSONS. By Edwin H. Woodruff, Professor of Law in Cornell University. New York: Baker, Voorhis, & Co. 1897. pp. xviii, 540.

A great deal of ground is attempted to be covered in this selection of cases, as can be seen from the headings of the chapters, which are: Contract to Marry; Contract of Marriage; Husband and Wife; Divorce and Separation; Parent and Child; Infancy; Insanity; Drunkenness; Aliens. Under these topics so many smaller divisions are treated that frequently only one or two cases, much condensed, are given on important single points. It would seem as if the student might be hurried along through the whole of a wide subject at a little too rapid a rate. The selection of the cases, however, appears to have been judicious.

R. G.

PROBATE REPORTS ANNOTATED. By Frank S. Rice. Vol. I. New York: Baker, Voorhis, & Co. 1897. pp. xxiv, 765.

The eight volumes of the American Probate Reports are well known to lawyers practising in the Probate Courts. This new series is a continuation of the older series of reports, in which fuller notes, a more careful selection of cases, more prompt publication, and the insertion of all dissenting opinions, are held out as substantial improvements. The last mentioned change, as is well pointed out by the editor in his preface, ought to be of great value.

R. G.

AMERICAN ELECTRICAL CASES. With Annotations. Edited by William W. Morrill. Volume VI. Albany: Matthew Bender. 1897. pp. xxvi, 929.

This stout volume contains all the American cases, except patent cases, on subjects relating to "the telegraph, the telephone, electric light and power, electric railways, and all other practical uses of electricity," decided from 1895 to 1897. It contains numerous long and carefully prepared notes. The series ought to prove useful to those lawyers having to deal with this class of cases.

R. G.



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## DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875.<sup>1</sup>

### PART II.

HAVING already sufficiently considered how and why the common-law system of pleading differs from that of the civil and canon law, it remains to inquire how the peculiarities of the former affect the subject of discovery. The inquiry is embarrassed by what may be termed the modern degeneracy of the common-law system. If the question could be limited to the period of time when that system was still in its full vigor, the answer would be easy. First, it would be clear that neither party would be entitled to any discovery until the pleadings were finished, for until then it could not be known what discovery would be needed, nor even whether any would be needed. Secondly, the question what discovery would be needed, and what, therefore, the parties respectively would be entitled to, would depend, not upon the allegations made in the respective pleadings, or any of them, but upon the question on which the parties were at issue, and therefore the amount needed would be small in comparison with the amount needed in the civil and canon law. Thirdly, discovery would not be needed for the purpose of eliminating the uncontroverted facts, as that would be sufficiently done by the pleadings. Fourthly, as the question to

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<sup>1</sup> Continued from page 157.

be tried would be as to the truth of a matter alleged by one of the parties, and indispensable to his case or defence, and upon a denial of which the other party was willing to rest the entire case, it would seldom be worth the while of either of the parties to attempt to prove by discovery anything which he could prove by witnesses.

What then was the effect of the relaxation which the system gradually underwent? Perhaps that question can best be answered by first asking what would have been the effect upon discovery of a complete abrogation of the rule against pleading double; for the answer to that question is easy. There would then be no compulsion upon either party to admit (by not denying) the truth of anything alleged by his adversary; and, as litigants do not as a rule (any more than military commanders) do anything voluntarily to help their adversaries, it must be assumed that, in the case supposed, everything alleged by either of the parties would be denied by the other. Therefore, as regards the amount of proof which would be required from the parties respectively (and therefore as regards discovery), the abrogation of the rule against pleading double would be the abrogation of everything peculiar to the common-law system, and the parties would be left in the same position as in the civil and canon law, i. e., each of them would have to prove everything alleged by him. What then would be the effect upon discovery of any partial abrogation of the rule against pleading double? It would depend upon the degree in which the partial abrogation left each party free to deny everything alleged by his adversary. It should be observed, however, that neither a partial nor a total abrogation of the rule would enable any one to say with certainty, in any given case, how much or what discovery would be needed, until the pleadings were finished; for no one could say with certainty that each of the parties would deny everything that he was free to deny, nor whether or to what extent any restraint which might still remain would be sufficient to prevent a denial.

Would the partial or total abrogation of the rule against pleading double affect the time at which the parties respectively would be entitled to discovery? It would still be true that each material and issuable allegation would be constructively admitted, unless it was separately traversed, and that upon each traverse an issue would arise. If, therefore, a defendant pleaded both affirmatively and negatively to the plaintiff's declaration, while the pleadings would continue in respect to the affirmative plea, they would cease, and

the parties would be at issue, in respect to each traverse. In short, a necessary consequence of the defendant's pleading both affirmatively and negatively would be that there would be at least two issues to be tried, and that they would arise at different times; and of course the same thing would be true in case of an affirmative and negative answer to any pleading subsequent to the declaration. Moreover, upon strict principle, it would seem to be clear that, whenever there are two or more issues in an action, the parties are respectively entitled to discovery upon each issue as soon as it arises.

We now at length reach the subject of discovery in the Court of Chancery. It has been already stated that the system of pleading used in that court was a borrowed one, and that the Court of Chancery was indebted for it partly to the ecclesiastical courts and partly to the common law; and it may now be added that, in its original form, the system was borrowed entirely from the ecclesiastical courts, and that the only parts of it which were borrowed from the common law (namely, pleas and demurrers) came in at a later date, and did not affect or interfere with the operation of the original system otherwise than by suspending it whenever they were employed.

Accordingly, the original system consisted entirely of a series of affirmative pleadings, and of course there were no constructive admissions. Soon, however, it underwent an alteration in form, which greatly changed its outward aspect. In the civil and canon law, as has been seen, the pleadings were, during their progress, under the constant supervision and control of the court, and if the Court of Chancery had borrowed this feature of the civil and canon law procedure, the change just referred to would in all probability never have taken place. Instead, however, it adopted the common-law practice of leaving the parties to conduct their pleadings out of court and in their own way; and yet it had none of the machinery necessary to make such a practice workable. Accordingly, what ought to have been anticipated happened, namely, that the pleadings degenerated into a war of words, in which of course neither party was willing to acknowledge defeat by being the first to leave the field.

The court, however, extricated itself from this difficulty in a manner which went far to redeem it from the discredit which had been incurred by falling into it, namely, by requiring each party to tell his entire story in a single pleading, i. e., by requiring the



plaintiff to insert his replication, etc., in his bill, and the defendant to insert his rejoinder, etc., in his answer. As, however, a plaintiff would frequently not be able to foresee what defence the defendant would set up, he could scarcely be required to insert his replication in his bill in the first instance; and accordingly he was given great facility for amending his bill when the answer came in. Moreover, if a plaintiff amended his bill, either by changing the statement of his case or by inserting a replication to the defence set up in the defendant's answer, of course the defendant must have an opportunity to meet such new matter. He could not, however (for a reason which will appear presently), amend his answer, and he was therefore permitted instead to file a further answer.

How then was the subject of discovery managed? In the ecclesiastical courts, as has been seen, each successive pleading contained within itself positions and articles, — the former for the adverse party to answer by way of discovery and the latter for witnesses to answer; and accordingly, when a party answered the positions contained in any pleading of the adverse party, he was said to answer the pleading itself. So also in the Court of Chancery, the defendant was required to answer, by way of discovery, not interrogatories, but the bill itself; and hence it became necessary for plaintiffs, if they would sift the consciences of defendants thoroughly, to insert positions (i. e., charges of evidence) in their bills. Still, this "foreign" mode of extracting information seems never to have become fully naturalized in the Court of Chancery; for plaintiffs were permitted also to insert interrogatories in their bills, and it was the constant practice to do so; and although in theory it was the allegations and charges, and not the interrogatories that the defendant was required to answer, and hence an interrogatory unsupported by a charge might be disregarded, yet this theory was constantly weakening, and there was a constantly increasing tendency to lose sight of it, and to treat the interrogatories as the thing to be answered.<sup>1</sup>

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<sup>1</sup> In the first report of the Chancery Commission of 1850, dated January 27, 1852, p. 5, it is said: "With a view to discovery, the Bill contains what is called the interrogating part, in which every statement and charge is converted into a series of questions framed on the principle that the defendant may possibly be a dishonest defendant, disposed to answer evasively, and, therefore, suggesting modifications of the statement or charge. For example, if the statement be of a deed bearing a certain date, and made between and executed by certain parties, in certain words, or to a certain effect, the questions would be whether such a deed of that date or some other and what date, was not made between and executed by such parties, or some, and which of them, or some

In the civil and canon law there was of course no danger whatever of mistaking the answers of a party by way of discovery for a pleading, for neither the positions answered nor the answers to them had any connection with any pleading. In the ecclesiastical courts there was perhaps some danger of this, for, as positions were incorporated with pleadings, it would have been an easy step to incorporate also into one document the answer to a pleading as a pleading, and the answers to it in the quality of positions; but, in fact, this step was never taken, and the two things always remained perfectly distinct. In the Court of Chancery, however, there was unfortunately no distinction made between an answer by way of discovery and an answer by way of defence. Both were, therefore, contained in one document, namely, the answer to the bill,—which, therefore, contained, not only the defendant's entire series of pleadings, but also his answers by way of discovery to the plaintiff's entire series of pleadings contained in the bill; and yet there was nothing whatever in the form of such answer to apprise one that it contained these different and discordant elements.

As a plaintiff often had occasion to amend his bill, on the coming in of the defendant's answer, in order to meet a defence set up in the answer, so he often had occasion to do so for the purpose of changing the statement or his case or his prayer for relief, or for the purpose of changing or adding to his charges of evidence. He would wish to do the former, because of the new light which the answer had thrown upon the case; and he would wish to do the latter, because he was not satisfied with the discovery already obtained, and therefore wished to sift the defendant's

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other, and what parties, in such words, or to such effect, or in some other and what words, or to some other and what effect." In *Faulder v. Stuart*, 11 Ves. 296, Lord Eldon said (p. 301): "Is there such a charge in the bill as to the payment of the consideration as entitles the plaintiff to an answer, not only whether it was paid, but as to all the circumstances, when, where, etc.? I have always understood that general charge enabled you to put all questions upon it that are material to make out whether it was paid; and it is not necessary to load the bill by adding to the general charge that it was not paid, that so it would appear if the defendant would set forth when, where, etc. The old rule was, that making that substantive charge you may, in the latter part of the bill, ask all questions that go to prove or disprove the truth of the fact so stated." It seems, therefore, that, while every interrogatory had to be founded upon a charge, yet a charge and an interrogatory founded upon it might be so drawn that the interrogatory would amplify the charge, and so render an answer to the charge alone insufficient. In this way, therefore, a defendant might be compelled to answer interrogatories.

conscience further. It should be also observed that a bill never lost or changed its identity by amendment, and never ceased to be, at least in legal contemplation, a single document. However often and however much a bill might be amended, it always remained the original bill as amended. An answer, therefore, was never superseded by a subsequent amendment of the bill, but, on the other hand, it would generally be rendered insufficient in point of discovery, and frequently it would be rendered inadequate to the defendant's needs as a pleading. How then could the defendant be compelled to give the further discovery required by the plaintiff, and how could he exercise the right of making the answer as a pleading what he desired it to be? He could not amend the answer because, having been sworn to, it must not be tampered with. What the defendant, therefore, did was to file a further answer, giving such further discovery as was necessary, and making such changes in the first answer as a pleading as he desired to make. Moreover, the first answer and all further answers were filed together, and all constituted in law but one answer to the one bill.

If, on the coming in of an answer, the plaintiff thought it insufficient, i. e., that it was not a full answer to his bill in point of discovery, he excepted to it in writing, i. e., pointed out what parts of the bill were not sufficiently answered, and thereupon the question of the sufficiency of the answer was decided, first by a Master, and then by the court (if necessary) on appeal. If it was decided that the answer was insufficient, the defendant was required to file a further answer, and so on till the bill was fully answered. This was therefore another, and a frequent, occasion for filing a further answer.

What if a bill contained allegations and charges which the defendant was not bound to answer? In the civil and canon law positions which the adverse party was not bound to answer ought not to be filed, and therefore the proper time for taking such an objection to positions was when they were offered to be filed. In the Court of Chancery, however, a defendant would not be entitled to have matter struck out of a bill merely because he was not bound to answer it, and therefore his proper mode of raising the objection was by refusing to answer, and stating in the answer his reasons for so refusing; and then the question would be tried on exceptions to the answer for insufficiency. If the reason why the defendant was not bound to answer did not appear



on the face of the bill, and so required to be proved, the defendant's course was to state in the answer the facts necessary to prove the existence of such reason, and whatever he said on that subject was conclusive against the plaintiff.

If an answer was insufficient, the plaintiff must at his peril except to it within the time prescribed for that purpose, and before taking any other step in the cause, for, if he failed to do so, he would be precluded from saying afterwards that the answer was insufficient; and, moreover, he would have to bring his cause to a hearing with no other discovery than what such insufficient answer contained, as he had let slip the only opportunity of supplying its deficiencies.

A plaintiff was entitled to obtain by answer to his bill, not only such discovery as he would have occasion to use at or before the first hearing of the cause, but also all such as he would have occasion to use after the first hearing, and especially in the Master's office. If, e. g., a bill was one which would require the taking of an account, the plaintiff was entitled, if he made the necessary charges, to any discovery which he could use on the taking of such account, though it was certain that the account would be taken after the first hearing, namely, in the Master's office, and under and pursuant to the decree made at the first hearing. At the same time, this was not the plaintiff's only opportunity of obtaining such discovery, for he could also obtain it when he got into the Master's office, though in a different mode, namely, by filing interrogatories with the Master, and requiring the defendant to answer them.

A very important part of the discovery obtained by a plaintiff in equity consisted of the contents of documents in the defendant's possession; and for the purpose of obtaining such discovery, it was necessary for the plaintiff to insert in his bill a charge of documents, i. e., a charge that the defendant had documents in his possession or under his control which contained evidence in the plaintiff's favor; and this charge the defendant was of course bound to answer. If he admitted that he had such documents, he was required to make and annex to his answer a schedule of them, with such a description of each as would serve completely to identify it. If he claimed, as to any of the documents, that he was not bound to produce them, notwithstanding that they contained evidence in the plaintiff's favor, he stated in his answer that he objected to producing them, giving his reasons, and also stating

such facts as he thought sufficient to prove that these reasons existed, if they did not appear on the face of the bill; and as to the facts so stated the answer was conclusive.

When the answer came in, the first question for the plaintiff to consider was whether the charge of documents was fully answered, and then whether the description of such documents as the defendant admitted to be in his possession, if any, was sufficient; and if the answer was insufficient in either of these respects, the plaintiff must except to it, and follow up the exceptions to their final results before taking any other step.

If the answer was not open to exception, and yet the plaintiff was not satisfied with it, and believed that the defendant had documents to which he was entitled, but which the defendant had not admitted to be in his possession, the plaintiff's only course was to amend his bill by making the charge of documents more specific, and entering into such details as either his knowledge or his imagination could suggest, and so require a further answer. The plaintiff was never permitted to produce affidavits, either to falsify the defendant's answer, or to prove that the defendant had documents to which the plaintiff was entitled; — not to falsify the defendant's answer, for that would not enable the plaintiff to get a better answer, and his proper remedy was to have the defendant indicted for perjury; — not to prove that the defendant had documents to which the plaintiff was entitled, for that could be proved by the defendant's answer alone.

When the plaintiff had got the best answer as to documents that he could get, the next question for him to consider was, whether he was entitled to production. If he thought he was, he applied for an order for production, whereupon the court heard an argument upon the question whether such an order ought to be made, the question depending entirely upon what was contained in the answer.

If the plaintiff was entitled to have certain documents produced, it did not follow that the production should extend to the entire contents of such documents, for the plaintiff was entitled to so much only as was material to his case. In case of books of account, in particular, it would often happen that a few entries only were of any concern to the plaintiff. Whenever, therefore, portions of any document contained nothing to which the plaintiff was entitled, the defendant could seal up all such portions, annexing to the document an affidavit stating that the portions

sealed up contained nothing revelant to the plaintiff's case. This, as the writer believes, was the only instance in which, by the practice of the Court of Chancery, a right to discovery was allowed to depend upon an affidavit; and, indeed, the affidavit in this instance was considered as a part of the answer.

If a bill was clearly bad on its face (i. e., if, assuming everything stated in the bill to be true, the plaintiff would clearly be entitled to no relief), the defendant ought not to be required to answer it by way of discovery; and yet it was not obvious how he could secure an exemption from answering it, as the question upon which the right of exemption depended could not regularly be decided until the hearing of the cause. In the ecclesiastical courts this difficulty could not arise, for, if a pleading were clearly bad, the adverse party could (as has been seen) procure its rejection by the court; but in the Court of Chancery a plaintiff was entitled to file any bill which his counsel would sign. To meet this difficulty, therefore, demurrers were borrowed from the common law. They were not borrowed, however, with all their consequences. The most important consequences of a demurrer at common law depended upon the principle of constructive admissions, and that principle was not borrowed at all with demurrers. In consequence of that principle, a demurrer at common law raised the question which of the parties was entitled to judgment upon the facts stated in the pleadings, and constructively admitted by the parties respectively to be true, — whereas, in the absence of that principle, a demurrer in the Court of Chancery merely raised the question whether, assuming the statements in the bill to be true, such legal consequences followed from them that the defendant ought to be required to answer them by way of discovery. Accordingly, the only consequence which followed from a decision upon a demurrer in the Court of Chancery was that the defendant was or was not bound to answer the bill. If the decision was in favor of the bill, an order was made overruling the demurrer, and the defendant was then required to answer, just as if no demurrer had been interposed. If the decision was against the bill, an order was made allowing the demurrer, and then the plaintiff could obtain no answer to the bill, unless he amended it, and without an answer he could take no further step in the suit.

Was it a good reason for not requiring a defendant to answer a bill by way of discovery, that his answer had set up a good affirmative defence to the bill, and therefore the discovery would be use-



less? No, clearly not; for, first, it would still be necessary for the plaintiff to prove his bill before the defendant could be called upon to prove his affirmative defence; secondly, it could not be known that the defendant would be able to prove his affirmative defence, and, if he failed to prove it, the plaintiff would of course be entitled to a decree upon proving his bill. It is, however, equally clear that a defendant to an action at law, who pleaded by way of confession and avoidance only, would not have to give discovery as to any of the traversable facts alleged in the declaration, as none of those facts would, under any circumstances, have to be proved, they all being constructively admitted to be true. Moreover, it was at least a fair question whether it would not be conducive to justice to give to a defendant in the Court of Chancery the option of admitting constructively (i. e., by not denying them) those allegations in the bill upon which the equity<sup>1</sup> of the bill depended, instead of answering the bill by way of discovery. At all events, this question was raised by those who presided in the Court of Chancery, and they answered it in the affirmative; and, for the purpose of affording to defendants such an option, pleas were borrowed from the common law, and defendants were given the option of defending by an answer or by a plea. As, however, the principle of constructive admissions was not borrowed at all with demurrers, so it was borrowed only in part with pleas; for unless and until a plaintiff took issue upon a plea, it had only the effect of a demurrer. Like a demurrer, it had to be set down by the defendant for argument immediately on being filed, and as upon the argument of a demurrer the question was whether the bill was good upon its face, so upon the argument of a plea the question was whether the plea was good upon its face. If the decision was against the plea, an order was made overruling it, and then the defendant had to answer, just as if he had not pleaded at all. If the decision was in favor of the plea, an order was made allowing it; and then the plaintiff had no choice but either to take issue upon the plea, or to abandon the suit. If he did the former, then the pleadings were at an end, and the cause was ready for the taking of testimony, and from that moment all the facts alleged in the bill which were necessary to its support stood admitted, and the only question to be tried was whether or not the plea was true; and as to that, of course the

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<sup>1</sup> The allegations in a bill upon which the equity of the bill depends correspond to the issuable or traversable allegations in a declaration. See *supra*, p. 149, note.

defendant had the burden. At the hearing, if the plea was proved, the defendant won the suit, and the bill was dismissed. If the plea failed of proof, a decree was made upon the facts admitted by the defendant, declaring the plaintiff to be entitled to relief, and referring the cause to a Master to ascertain and report the kind and amount of relief to which the plaintiff was entitled. On the reference, as the plaintiff would have the burden, he would be entitled to discovery, and he would obtain it by filing interrogatories with the Master, and requiring the defendant to answer them.

It has been assumed that the plea was affirmative; but the principles applicable to a negative plea were the same, subject to these differences; namely, that, upon a negative plea, the defendant's constructive admissions were limited to facts not denied by the plea; that the contest was not upon new facts alleged by the defendant, but upon a fact alleged in the bill and denied by the plea, and as to which, therefore, the plaintiff was entitled to discovery, notwithstanding the plea; and that the plea therefore required the support of an answer. It must not be supposed, however, that an affirmative plea always protected the defendant from answering the bill at all by way of discovery; for the bill might contain an affirmative replication to the defence set up by the plea, or it might contain charges of evidence in disproof of the plea, and in either case (unless, indeed, in the first case, the affirmative replication was constructively admitted by an affirmative rejoinder) the plea would require the support of an answer as to the replication or the charges of evidence. It would seem also that upon principle every plea required the support of an answer as to any allegations or charges in the bill which constituted no part of its equity, but which affected merely the amount or kind of relief to which the plaintiff would be entitled, since there was no constructive admission of any such allegations or charges, and therefore as to them it was immaterial whether the defence was by plea or by answer. This view, however, was never adopted by the Court of Chancery.

It may be observed that, when a defendant pleaded to a bill, and also answered in support of the plea, the plea and the answer were both contained in one document, the answer following the plea.

It will be seen that no question could ever arise as to the time at which a plaintiff was entitled to discovery in the Court of Chancery; for there was but one time when he could have it, namely, immediately on filing the bill, and before any other step was taken in the suit; or perhaps it should rather be said that a plaintiff had no

other opportunity to obtain discovery until he obtained a decree, and got into the Master's office.

Nothing has been said hitherto as to discovery in Chancery by the plaintiff in favor of the defendant, and yet a defendant had the same rights in respect to discovery that a plaintiff had. But it is to be observed that the Lord Chancellor enforced discovery, even by the defendant in favor of the plaintiff, not by virtue of any inherent power of his own, but by virtue of the power of the Crown wielded by him. Indeed, the command to a defendant, by virtue of which he was compelled to answer the bill, though issued under the direction of the Lord Chancellor, was not only in the name of the King, but was contained in a writ under the Great Seal (i. e., the writ of *subpœna*), and no such writ could issue against a plaintiff as such, unless he had incurred some default or liability in the suit itself, and he could not incur any default or liability for not giving discovery, so long as no command was laid upon him to give it. He had come into the court voluntarily, complaining of the defendant, and seeking relief against him, and the defendant as such was in no condition to complain against him. Moreover, the only mode of giving discovery known to the Court of Chancery was by answer to a bill filed, and a bill could be filed only by a plaintiff as such. If, therefore, a defendant wished to obtain discovery from the plaintiff, he must make himself a plaintiff by filing a bill, and must make the original plaintiff a defendant to that bill, and must thereupon procure a writ of *subpœna* to be issued and served upon him, commanding him to answer the bill; and as the sole purpose of such a bill would be to obtain discovery in aid of the plaintiff's defence to the original bill, of course it would ask for no relief, and so would be a bill for discovery merely; and thus we are brought to the subject of bills for discovery.

Such bills are divisible into three classes, namely, bills in aid of actions at law, bills in aid of defences to actions at law, and bills in aid of defences to bills in equity, though the last two may for many purposes be regarded as one. They all present very serious difficulties, both theoretically and practically,—difficulties too which have never been satisfactorily solved. Every bill for discovery is anomalous in this, namely, that it seeks discovery, not to aid in the proof of the bill itself, but to be used in another suit, and in proof of facts with which the bill has no concern. A suit might indeed, without any flagrant violation of principle, be brought for the purpose of obtaining discovery to be used in another suit, but



the discovery would then be the final object of the suit, and so would be what relief is upon a bill for relief, and accordingly should be given by a decree.<sup>1</sup> The question, and the only question, to be tried upon such a bill is whether the plaintiff is entitled to the discovery which he seeks, just as, upon a bill for relief, the question to be tried is whether the plaintiff is entitled to the relief which he seeks; and, therefore, the bill should state, not the facts as to which the discovery is sought, but the facts upon which the right to discovery depends, and the only part of the bill which should contain any reference to the facts as to which discovery is sought is the prayer, i. e., the prayer for discovery. The plaintiff would of course be entitled to an answer to the bill by way of discovery, but it would be as to the facts upon which the right to the principal discovery depended.

An inquiry into the nature of the right upon which a bill for discovery is based will lead to the same conclusion. What is that right? Surely it is the right to have discovery, just as the right upon which a bill for relief is based is the right to have relief, though there are so many varieties of the latter right that it requires to be subdivided. There is of course no legal right to have discovery, but there are numberless bills in equity which have no legal right to rest upon, and which nevertheless will lie. Why? Because the interests of justice require that they should, and therefore equity raises a right upon which they can rest; and bills for discovery are instances of such bills. It is true that a right to discovery will not support a bill, if the discovery is wanted merely for the purpose of obtaining relief in equity; for the right to discovery is then merely incidental to the right to relief, and both must be obtained in the same suit. But where the discovery is to be used in one suit, and must be obtained in another suit, the right to discovery is necessarily a principal right, and there is no reason why it should not support a bill.

Still, the Court of Chancery never adopted any of the foregoing views; nor could it well do so, so long as it adhered to its practice of requiring a defendant to a bill for discovery to give the discovery sought in his answer to the bill. An attempt was also made by the court to reconcile its practice with principle by adopting a different view from that suggested above, as to the right upon which the bill was founded; namely, that, when it was in aid of an

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<sup>1</sup> See *infra*, page 219, last sentence.

action, it was founded upon the same right as that upon which the action was founded, and that, when it was in aid of a defence, it was founded upon such defence. Accordingly, it was held that a bill for discovery in aid of an action should be framed in the same manner as if the plaintiff were seeking relief in equity as well as discovery, except that the prayer must stop short with asking for discovery, instead of going on and asking for relief also. Hence, if the bill did not state such facts as showed the plaintiff to be entitled to recover at law, it was open to a demurrer; and if any fact necessary to the cause of action was untrue, or if the defendant had an affirmative defence to the cause of action, he could successfully plead to the bill. So also, if the bill was in aid of a defence, it was held that the defence must be stated fully, and that the question whether or not it was a good defence could be raised by demurrer; and consistency required the court also to hold that such a bill could be pleaded to in the same manner as a bill in aid of an action.

It will be seen, therefore, that the court shut its eyes to the fact that the discovery sought by the bill was to be used in another suit, and acted as if it were to be used in the same suit, namely, for the establishment of the case or defence which was the subject of it; and perhaps it would be too much to say that the court could not, if it saw fit, adopt that view in respect to bills in aid of actions;<sup>1</sup> but how could it possibly do so in respect to bills in aid of defences? A defence, simply as such, will not support a bill; and yet there is nothing else to support the bill, in the case now supposed, except the right to discovery, and the latter is sufficient to support the bill without defence, and it is not aided by the defence; and the only object in stating the defence is to obtain admissions respecting it by way of discovery. Indeed, if the discovery could be obtained by means of interrogatories, there would be no occasion whatever for stating the defence in the bill. But what seems to be conclusive is the fact that the defence in aid of which the discovery is sought may be merely a negative, and so incapable, for that reason, of supporting a bill.

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<sup>1</sup> And yet the adoption of such a view in any case involves the absurdity of holding that a suit may terminate with the answer to the bill, and yet accomplish every purpose for which it was instituted; and a greater absurdity there could not well be. The pleadings in a cause are a means,—not an end; and a judgment or decree, or at least an act of the court of some kind, is the only instrumentality by which the final object of a suit can be obtained.

Moreover, it may well be doubted whether the Court of Chancery was well advised in adopting the view that it did as to a bill for discovery in aid of an action; for a consequence of it was that the court was constantly called upon to decide upon the merits of a controversy for the mere purpose of ascertaining whether or not the plaintiff was entitled to discovery; and if the defendant pleaded to the bill, and the plaintiff took issue upon the plea, it would be necessary, for the same limited purpose, to incur all the expense and delay of bringing the cause to a hearing. It may also be stated, as a minor objection, that a consequence of the view adopted was that, upon every bill for discovery in aid of an action, discovery had to be given as to all the facts of the plaintiff's case, instead of being limited to the plaintiff's actual needs, i. e., to the issue or issues about to be tried.

Another consequence of the view adopted (though it may not have been an objection to it) was, that a bill for discovery could be filed as soon as the cause of action or the defence which was the subject of it accrued, and it was immaterial whether the action or suit, in which the discovery was to be used, had been instituted or not, while a consequence of adopting the other view would have been that the bill could not be filed till the action or suit in which the discovery was to be used had been brought and was at issue.

It has always been supposed to be another consequence of the view that was adopted, that every suit for discovery terminated the moment it was judicially ascertained that the defendant had fully answered the bill; and hence that there could never be any taking of testimony, nor any hearing, nor any decree, in such a suit; and it is true that an answer always terminated the suit, if the plaintiff succeeded in obtaining one, for an answer gave the plaintiff all he wanted, and all he could get. But if the defendant pleaded to the bill, and his plea was allowed, the plaintiff could never get an answer; and yet he could reply to the plea, and thus put the cause at issue, and if he did so he would then be entitled to take testimony and bring the cause to a hearing, and if he succeeded at the hearing he would be entitled to discovery, and as it would be too late to obtain it by answer, the court would have to make a decree directing that the defendant answer interrogatories in the Master's office.

*C. C. Langdell.*

*[To be continued.]*



## THE JUDICIAL USE OF TORTURE.

## PART I.

TO a person with a philosophic turn of mind the interest in history consists not so much in what men have done in the past as in the reason why they have done it. This is especially true of the use of torture, in itself the most revolting chapter in history, but one which has a peculiar moral value as showing the terrible results that may come from erroneous legal theories; for, strange as it may seem, the habitual resort to torture in trials has been mainly due, not to a thirst for vengeance or to wanton cruelty, but to highly artificial principles of law devised without a consciously cruel intent. The practice has, in fact, been far less common in barbarous ages than in periods of civilization and refinement.

The earliest use of torture of which we have much knowledge was in Athens and Rome. Among the Greeks and under the Roman Republic torture was almost entirely confined to slaves, as a rule no free citizen being subjected to it; and in Rome, indeed, the exemption was one of the privileges of citizenship. The reason for torturing slaves is to be found, no doubt, in the belief that the slave, being absolutely at the mercy of his master, would naturally testify in accordance with the master's wishes, unless some stronger incentive to speak the truth were brought to bear. The law provided, therefore, not that he might be tortured if suspected of falsehood, but that his evidence could never be given without it, the defeated party in the suit paying to the master any damages sustained by a permanent injury to the slave. Now it may be observed that this rule of law rested on a theory of evidence, the theory that the testimony of a slave freely given was so unreliable as to be altogether inadmissible, and hence it applied to all cases, whether civil or criminal, and whether the slave himself was accused of wrongdoing or not. The inhuman character of the theory is the more shocking when we reflect that the slaves usually belonged to the same race as their masters, were sometimes on a footing of intimacy, and were often intrusted with highly important matters, which must have made their evidence in civil suits indispensable. Among them, moreover, were men of education;

many physicians, for example, belonging to this class. And yet, pitiless as the theory was, it clearly did not spring from deliberately cruel motives, because it applied whether the conduct of the slave had given any one cause for anger or not.

Such was the use of torture in Greece. It was the same in Rome during the period of the Republic; but after the creation of the Empire a change in the law began to take place. The species of jury which had been in use gradually disappeared, and the ordinary criminal procedure assumed more and more the form of an inquest by the magistrates. At the same time the importance of protecting the head of the state as the source of law or order, and the natural desire of the Emperor to surround himself with safeguards, caused the *crimen læsæ majestatis*, or high treason, to be treated as one of peculiar atrocity, and torture was permitted even in the case of free persons accused of it,—a rule which was afterwards applied to other grave offences, although with a number of exemptions in favor of men of high rank. Thus torture ceased to be used solely in consequence of a rule of evidence about the testimony of slaves, and grew to be also a means of convicting freemen charged with heinous crime. But it never developed in Rome into the systematic engine of criminal procedure that it became in modern times.

After the barbarian invasions and the fall of the Roman Empire of the West, Roman law decayed, and with it torture for freemen disappeared everywhere, except in Spain. The Teutonic tribes no doubt resorted to it occasionally to extort confession or gratify revenge, but their legal notions were far too crude to make it a regular part of the judicial machinery. Crime was regarded by them as a private wrong, and no clear distinction was drawn between civil and criminal proceedings. Nor were they perplexed by the difficulty in discovering the truth, which presents the chief obstacle to the detection and punishment of crime in highly civilized communities. To them the main problem was to ascertain the law; the facts could be determined by a number of simple tests. One of the most ancient and common of these was compurgation, whereby the accused took an oath that the charge against him was false, and produced a fixed number of his kinsmen or neighbors who swore that his oath was pure and true. Other forms of trial involved an appeal to God, a miracle attesting the innocence or guilt of the accused. To this class belonged the various kinds of ordeal; the ordeal by water, where the victim on

being thrown into the water sank if innocent, and floated if guilty; the ordeal of the corsnaed, reserved chiefly for priests, where a morsel of consecrated bread or cheese was used, which the innocent alone could swallow without choking; the ordeal of boiling water and hot iron, where the accused thrust his arm into a boiling caldron or carried in his hand a piece of hot iron, guilt being proved by the failure of the wound to heal in three days. It seems at first sight surprising that the futility of such tests was not felt; but in point of fact the question to what ordeal the accused should be put, and the severity of the ordeal itself,—the depth, for example, to which the arm should be plunged into the water, or the weight of the iron and the distance it must be carried,—depended in part on the known character of the accused, and the amount of evidence against him; so that the result of the test was apt to accord with the previous opinions of the people.

Another form of appeal to the judgment of God was the wager of battle. The origin of the custom cannot be traced, for it is found everywhere in Europe at the dawn of history, but it was peculiarly suited to the spirit of chivalry, and grew rapidly in popularity when feudalism gained a firm foothold, becoming at last the common form of trial for men of knightly rank. The person accused of crime had a right not only to fight his accuser, but to challenge a hostile witness, and sometimes even a judge whom he charged with an unfair decision. Before the combat each contestant took a solemn oath to the justice of his cause, and hence the defeated party was not only proved to be in the wrong, but was convicted of perjury, and was liable to be punished accordingly. Women, priests, children, old men and cripples, who were naturally unable to fight in person, appeared by champion, and this privilege, which was at times extended to able-bodied men, became a source of scandal, the champions being, of course, in the end mere hired ruffians. But the public confidence in this form of appeal to the Divine justice was exceedingly strong, and tales were told of miraculous defeats of wicked knights by their feebler but righteous antagonists.

So long as the belief in the value of such tests of innocence remained unshaken, there was clearly no need to extract confessions by means of torture; but with the increase of civilization that belief was gradually outgrown. Compurgation and the ordeal began to fall into disuse; and in 1215 the latter was given a fatal blow by the Lateran Council, which forbade priests to perform the



rites of the Church in connection with it, and thereby deprived it of the religious sanction on which rested its moral force. The wager of battle lasted somewhat longer, because the feudal nobility clung to it as a privilege of their class. In France, St. Louis and Philip the Fair strove to abolish it, and although their efforts were only partially successful, and were followed on each occasion by a revival of the practice, judicial duels became less and less frequent until they gradually disappeared altogether. As yet, however, no new form of criminal trial had arisen on the Continent to replace those which were fast becoming obsolete. A procedure by an inquest of sworn witnesses had, indeed, come into use in France; and if that country, like England, had possessed a centralized and powerful judicial organization, the inquest might perhaps have grown into trial by jury, as it did across the Channel. But the process, which could only be applied when the accused consented to submit to it, was far too crude to be effective, and the royal courts had not acquired vigor enough to develop it, or to create any enlightened legal system of their own, before the revival of the study of Roman Law, in the latter part of the twelfth century, prepared the way for an entire change in the principles of criminal procedure, and for the introduction of torture.

It has already been remarked that in the early Middle Ages no clear distinction was drawn between civil and criminal cases. Crimes were regarded as private wrongs, and their punishment was left entirely to the action of the persons injured; but a more effective means of repression was needed, and a bold departure was made at the close of the twelfth century, when Innocent III., in order to put an end to the scandals among the clergy, set up an inquisitorial procedure. It began by a secret inquiry on the part of the judge, followed by an interrogation of the accused, who was obliged to answer upon oath. With the attempts to suppress heresy during the thirteenth century this process hardened into the Inquisition, and the use of torture was borrowed from the Roman Law, on the principle that heresy was *crimen læsæ majestatis divinæ*. Thus torture reappeared in Europe at the very moment that the progress of civilization began to be rapid.

The new inquisitorial procedure, which was thoroughly in harmony with the spirit of Roman jurisprudence, was gradually adopted by the continental states, until at last prosecutions for crime were carried on almost exclusively by the judicial officers of the government; and of course they were conducted with greater

and greater secrecy. Under these circumstances it is not unnatural that torture should have been used. A man who was both judge and prosecutor, and who felt almost certain of a prisoner's guilt, but could not quite prove it, was strongly tempted to fortify his opinion by forcing a confession. He had no jury to relieve him of responsibility for the facts. Moreover, the practice saved him an immense amount of trouble. Sir James Stephen tells us that during the preparation of the Indian Code of Criminal Procedure in 1872 some discussion took place about the reasons which occasionally led native police officers to torture prisoners, when an experienced civil officer observed, "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." This view of the matter will be readily understood by every one who has tried to hunt up evidence enough to prove an obscure case after becoming convinced of the facts in his own mind. Motives of this kind, backed by the all-powerful authority of the Roman Law, led quite naturally to the use of torture. But the thing that made the rack a regular systematic part of criminal procedure, instead of an exceptional resource, was the "theory of proof."

Almost any person who is called upon to judge a large number of offences of the same kind will find himself insensibly falling into theories of proof. He will find himself comparing the case at bar with others that have gone before, with the feeling that where the evidence is the same the judgment ought to be the same; that a state of facts which he thought was or was not sufficient to prove guilt in former cases ought to have a similar effect on his opinion in the case under consideration; and thus he will frame a more or less clearly defined standard or rule of proof. With the scientific jurist the process is more conscious than with other men, and the standard or rule tends to become more elaborate and precise. Now this process went on in the minds of the continental lawyers from the fourteenth to the seventeenth century, until at last the principles evolved became so rigid that the judge was looked upon almost as a machine, deciding without regard to his personal impressions. The rules were supposed, like an instrument in a physical laboratory, to furnish an absolute test which relieved him from the necessity of weighing in his own mind the evidence before him.

In its conception the theory of proof appeared to be eminently humane, for it was based upon the principle that no man ought to



be convicted of a grave crime unless the evidence was absolutely conclusive, — clearer than daylight, as the phrase ran. Proof of this character was said to be complete, and without it no condemnation could take place. The testimony of two eyewitnesses of the crime was enough for the purpose, and so was evidence from documents properly authenticated. A few presumptions held to be conclusive were also sufficient, such as the fact that the accused had been seen by two witnesses flying from the scene of a murder with a bloody weapon in his hand. But in the nature of things such evidence was rare, and in the great majority of cases it was necessary to build up a complete proof by other means. With this object evidence was divided into proximate and remote indications of guilt; the former comprising the testimony of a single witness, documents imperfectly authenticated, extrajudicial confession, and a multitude of presumptions, some of them extremely feeble, such as the quality of the accuser and the accused. The remote indications were weaker still, occasionally absolutely frivolous, as the evil mien of the prisoner, for example. Indications of guilt did not furnish by themselves sufficient proof to convict, but a strong proximate indication, or a feebler one coupled with one or two remote indications, was enough when combined with confession under torture to establish the complete proof required. The result is obvious. Except in the rare cases where the crime had been committed in the presence of two witnesses, and the still rarer ones of proof by documents or conclusive presumptions, the prisoner was stretched upon the rack; and in fact the chief effect of the doctrine of indications was to permit the use of torture. When one reflects upon the agony that flowed for centuries from an erroneous legal theory, the cold, hard subtlety of the human mind assumes an aspect that is truly diabolical.

It is clear that a theory of proof can exist only in criminal cases. A theory of evidence, regulating the admissibility of testimony, can apply to all trials; but the doctrine of proof clearer than daylight, like the common law principle of proof beyond reasonable doubt, could be applied to crimes alone. In a civil case it would be unjust not to decide in favor of the side that appears on the whole to be in the right, that is, the judgment must depend on the mere balance of evidence, and hence neither party can be required to make the proof of his case absolutely conclusive. The theory of proof, with torture as its companion, was therefore limited to criminal cases, and in fact it was applied only to offences punished by death or mutilation.



The history of criminal process during the time when torture prevailed may be traced most readily in France, and there its most complete development was embodied in the Ordinance of 1670. The procedure established by that statute was briefly as follows. Except when the culprit was seized in the act, the process began by an information emanating from the Procurator of the King, that is, the district attorney, or from an individual, or from the judge's own motion. In any case, the first step was to summon the witnesses, who were examined separately and secretly by the judge, their depositions being taken down in writing. These depositions were then submitted to the procurator, in order that he might decide whether there was sufficient ground for prosecution or not. If he determined to proceed, the accused was summoned, or in the case of grave crimes arrested, and questioned upon oath by the judge, the answers, like every other part of the procedure, being carefully reduced to writing. The art of interrogating a prisoner so as to entrap him was one of great importance to the judge, and the treatises on criminal law contain many precepts on the subject. The examination was conducted in private by the judge and his clerk, and in fact in the case of crimes punishable with death, which it must be remembered were exceedingly numerous, the prisoner was not allowed to communicate with, or be defended by, counsel at any stage of the proceedings, from arrest to final judgment. The examination of the prisoner ended the preliminary investigation, and if he had confessed his guilt, and the evidence so far obtained was sufficient in the opinion of the procurator to warrant a conviction, he could, in the case of slight offences, ask for an immediate judgment by the court. Otherwise the more serious part of the proceedings began, and, except in the rare instances when a trial by inquest was ordered, they followed what was still called the *procès extraordinaire*, although it was in fact the form pursued in the vast majority of cases. The witnesses were now summoned a second time, their previous depositions were read, corrected if need be, and sworn to by them. They were then brought face to face with the prisoner. This was the first opportunity he was given to learn the charges against him, or the evidence by which they were supported; but it afforded him little help in making his defence, because obstacles of all kinds were placed in his way. He was allowed, for example, to present objections to the credibility of any witness, but he must do it before the deposition of that witness was read to him. Then, after

the deposition had been read, he could propound questions in relation thereto, but if the answers changed in any substantial point the statements in the deposition, the witness was guilty of perjury, and as that was a capital crime he had the very strongest motive for refusing to admit the possibility of mistake, and for backing up his previous assertions by falsehood if necessary. The chance of breaking down the testimony under such conditions was, to say the least, extremely small. The most surprising obstacle in the prisoner's way was, however, the strange rule about evidence of innocence. The prisoner was at liberty to set up a special positive defence, — such as an alibi, self-defence, or insanity, — and name his witnesses, who were thereupon summoned by the judge and examined secretly in his absence. But this privilege, meagre as it was, covered all the evidence he was permitted to offer. He was not allowed to produce witnesses to contradict the main charge against him, on the principle that unless the proof of his guilt was absolutely conclusive he could not be condemned, and if it fulfilled that requirement it must logically be impossible to contradict it, — a principle that suggests the farmer, elected a local judge in one of the rural districts of New York, who remarked, at the end of his first petty criminal trial, that after hearing the case for the government he had been clear for conviction, and that he would never listen to the evidence on both sides again, for it was very confusing to one's judgment. Montesquieu comments on the fact that by the French law of his day the prisoner was not allowed to produce evidence to disprove his own guilt, that he was tortured, and that perjury was a capital offence, while in England the opposite was true in each case, and he remarks that the three principles go together. They were all, in fact, logical deductions from the theory of proof. The relation of that theory to torture and to the refusal to hear witnesses for the defence has already been pointed out, and as regards perjury it is evident that, if the prisoner's guilt were to be decided solely on the testimony of the witnesses for the prosecution, their veracity must be insured by the strongest sanction possible.

The elaborate record of the case, containing all the depositions, examinations, and documents, in short, the whole of the evidence, was now delivered to the procurator, who was entitled to demand a judgment upon it by the full court. In prosecutions for grave crimes, however, where the theory of proof applied, he did so only in case the complete proof required for conviction had already

been obtained. This was, of course, rare, and hence the procurator usually asked first for the torture of the accused, which was ordered if the indications of guilt disclosed by the evidence were deemed strong enough to warrant it. In other words, the prisoner was tortured whenever his confession was necessary and sufficient to make out the complete proof of his guilt, and that was usually the case.

In the application of torture, as in all other parts of the criminal procedure, we find an ostentation of principles professedly humane combined with frightful cruelty in practice. Thus laws that neither life nor limb should be endangered were often enacted, and as persistently disregarded. There were statutes, moreover, forbidding a repetition of torture, but they were commonly evaded by the pretence that the examination was merely continued from time to time and not repeated. In France, it is true, the Ordinance of 1670 at last put an effectual stop to this custom, but it was almost the only mitigation of criminal procedure that took place. In other respects it grew steadily more and more rigorous. Again, it was a principle universally acknowledged that a confession extorted by pain was invalid unless freely confirmed afterwards, but if the prisoner retracted he was tortured once more. In some places the process could be repeated indefinitely, in others only a limited number of times, but in any case the principle was a source of renewed suffering rather than a means of escape from punishment.

After the *instruction*, as the taking of the evidence was called, had been completed, the record was delivered to one of the judges, who prepared a report of the case for the full court. This judge was sometimes the same man who had conducted the examinations, and in any case the voluminous length of the record and the fact that no counsel were heard on either side, gave his report a decisive weight with his colleagues. The prisoner was, indeed, interrogated by the court, and allowed to make a statement, but with the highly technical ideas of proof that prevailed his words could not have much effect. The formality of the last interrogatory over, the court rendered its judgment and imposed the sentence.

It will be observed that the whole proceeding was not a trial in the sense in which we use the term. It was not a struggle between two parties, one trying to prove a charge, and the other to disprove it, before an impartial tribunal. It was strictly an inquisition,



in which the judge attempted to detect a crime, and satisfy himself by his own efforts of the prisoner's guilt. It bears a considerable resemblance to the case of a physician called upon to certify whether a man ought to be committed to an insane asylum or not. He inquires of the friends or neighbors about the man's behavior, and he does it when the man is not present. He questions the man himself, and, what corresponds to the use of torture although without the cruelty, he may subject the patient to some medical test. He does not profess to conduct a trial in which the lunatic has a fair chance to defend himself. He simply tries to satisfy himself about a fact. This is surely the only point of view from which the inquisitorial procedure of continental Europe can be understood. That torture should have formed a part of such a process is not surprising, for until a little more than a century ago the world had never reached such a degree of civilization as to discard torture from motives of humanity. The thing that excites surprise and indignation is the inexorable "theory of proof," which made torture an almost invariable accompaniment of every trial, although the proof was morally and rationally strong enough without it, and sometimes when the indications of guilt were to a normal mind absurdly small.

Of the actual effect of torture in the condemnation of the innocent it would be rash to speak in general terms. The world is now convinced that no reliance whatever can be placed upon it as a means of discovering the truth; and there is no need at the present day to recount stories like that of Philotas accused of conspiring against Alexander, who cried to his tormentors that he would confess if they would let him go, but when unbound asked what they would like to have him confess. With what terrible effect the relentless procedure could be used against the innocent is shown by the trials for witchcraft in Germany, and the epidemic of convictions for poisoning wells in Northern France. In fact, the very similarity in the long catalogue of confessions in these cases, which seemed to the judges the clearest proof of guilt, appears to us conclusive evidence that the statements had no foundation, and were invented solely to escape suffering by satisfying the court. But, on the other hand, a magistrate whose life was spent in dealing with crime must have learnt by experience a great deal about criminals. He must have acquired the power of forming a shrewd opinion on the guilt of the prisoners before him; and it can hardly be supposed that, where neither popular fanaticism,

nor political rancor, nor private prejudice was involved, he would deliberately send innocent men to execution. The theory of proof purported to reduce the judge to a mere machine, but any definition of the indications required to put a prisoner to the torture was of necessity somewhat vague, and it is inconceivable that the judge should not in ordinary cases have been guided by his own belief in the guilt or innocence of the accused.

The use of torture was not entirely confined to procuring the conviction of a prisoner by extorting his confession. It was also occasionally used for witnesses who were believed to be concealing the truth, and it was a regular engine for compelling a condemned criminal to reveal his accomplices; but neither of these cases has any interest from the point of view of criminal procedure, or the evolution of juridical ideas.

With the growth of the sentiment of humanity in the last century the idea of torture became by degrees intolerable, Voltaire and his contemporaries attacking it furiously until it was generally condemned by public opinion on the Continent. One of the first steps towards its abolition was taken in 1740 by Frederick the Great, who forbade its use except in cases of treason and atrocious crimes, and his example was followed in other countries. In France, torture as a part of the process of trial was legally, but not quite effectually, forbidden in 1780; and finally the French Revolution gave a death blow to the practice throughout Europe, although it was not entirely swept away everywhere until the present century. In this age of anæsthetics, when we shrink from all physical pain, it makes one shudder to think how recently the deliberate infliction of exquisite suffering was a regular part of criminal trials. One can understand it only by reflecting that the bounds of human sympathy widen slowly; that over most of the civilized world the suffering of animals excites as little pity now as that of criminals did a hundred and fifty years ago.

One closing word about the French criminal trial at the present day. Torture was abolished at the Revolution, but the main outlines of the system of procedure of which it formed a part were left unchanged; and in fact the modern French trial for the graver classes of crimes is in substance the old inquisitorial process with the torture left out, and a jury somewhat inharmoniously tacked on. It is begun by the *juge d'instruction*, who examines separately, secretly, and in the absence of the accused, all persons having any knowledge of the affair, their depositions being, of course, carefully

taken down. The judge then interrogates the supposed offender in the same secret way, and without the presence of counsel. In fact, he has power, by orders issued for ten days at a time, to keep the prisoner in solitary confinement for an indefinite length of time, in order to try to obtain a confession, or at least corroborative evidence of guilt. The period of detention is sometimes very long, and it is asserted that occasionally the harshness of treatment comes very near to actual torture. The information obtained from every source is carefully recorded by the judge in the form of memoranda called *procès verbaux*, and if there is evidence enough to warrant a trial these are submitted, with the depositions and other documents, to the Chamber of Accusation, a body composed of members of the court that is to try the case, but not containing the judges who are to sit at the trial. The chamber hears no witnesses, but reviews the evidence, and if of opinion that the case ought to proceed, draws up an *arrêt de renvoy*, which corresponds to our indictment. The procurator then prepares an act of accusation, which is supposed to be a bare statement of the crime, but is in fact an argument for the government, and as such has a decided influence on the result. The preliminary part of the case, however, is not yet quite over, and before the prisoner is allowed to see his counsel, or to have copies of the indictment and the depositions, he is once more questioned,—this time by the judge who is to preside at the final hearing.

The last interrogation of the accused is a sort of prelude to the trial, and has the effect of enabling the presiding judge to conduct successfully a rigorous cross-examination of the prisoner. This examination is a very important part of the proceedings, and occurs immediately after the reading of the act of accusation with which the trial opens. After the cross-examination, the procurator addresses the jury, and then the witnesses are called. These, however, do not testify in the manner to which we are accustomed. It is important, if not essential, to a fair trial by an inexperienced body of men like a jury, that evidence should be excluded which has in reality very little bearing on the case, but would be likely, by raising a prejudice, to have far more weight with them than it deserves. In other words, rules of evidence are almost a necessity in trial by jury; and in Anglo-Saxon courts their observance is secured by allowing a witness to speak only in answer to definite questions, so that the judge and the adverse party hear each fragment of evidence offered, and can object to it before it is actually



given. But in France, where jury trial is recent, no rules about the admissibility of evidence have developed, and each witness says whatever he pleases, tells his story in his own way, and cannot be interrupted. After he has finished he can be questioned by the presiding judge, and, with the consent of the court, by the jury-men and the procurator also; but he cannot be effectively cross-examined by the prisoner or his counsel, for they are not allowed to interrogate him directly, and can do so only by the cumbrous process of suggesting questions to be asked by the president. An acute Japanese observer has remarked that the true glory of Anglo-Saxon procedure lies not so much in trial by jury as in the art of cross-examination; but this is really practised in France only on the side of the prosecution. In the case of the prisoner himself, it is, indeed, continually repeated throughout the trial; for no sooner has a witness finished his statement than the prisoner is interrogated in regard to it. To cross-examine the prisoner with the utmost severity, and not give him a chance to cross-examine freely the witnesses against him, seems to us a strange inversion of principles.

When the evidence is all in, the jury is addressed by the procurator, and by the accused or his counsel, and formerly a final summing up of the case was made by the presiding judge; but as that officer was felt to be too much biased against the accused, his right to sum up was abolished in 1882. The jury then retire with a list of questions of fact which they must answer *Yes* or *No*, their answers forming the basis for the judgment of the court.

The reader will observe, what was stated at the outset, that the modern procedure is in its main outlines the old one with the torture left out and a jury incongruously tacked on. The preliminary process still consists of an attempt by a magistrate to unravel a crime and collect evidence of guilt. It is strictly inquisitorial and secret, and except for the omission of physical torture it has remained substantially unchanged. The second part of the process has been modified in a much greater degree, for the presence of the jury has brought publicity and destroyed the theory of proof. And yet even here the old inquisitorial traditions are clearly seen in the treatment of the prisoner and in his inability to cross-question the witnesses directly. One cannot help feeling at every turn that he is the subject of an inquest, rather than a party to a trial. In one respect the existence of the jury has made the procedure less fair. Formerly the evidence collected by the

magistrate was delivered to a fresh body of judges, who were expected to examine and decide upon it impartially. Now this is done only by the Chamber of Accusation, which formulates the indictment; for at the trial before the jury the presiding judge has been to some extent transformed into an advocate, whose professional pride is involved in procuring a conviction. Herein lies the root of the inconsistency in the whole procedure. The real trial is still carried on, as of old, by the professional magistrates in secret, and the public trial involves an effort on their part to induce the jury to ratify the conclusion already reached. It is said that the professional magistrates are just, and that an innocent man rarely comes before the jury at all. This is no doubt true, but it does not cure the inherent defect of the procedure. It does not obviate the fact that the attempt to combine the French and English systems of trial has placed the presiding judge, the jury, and the prisoner in false relations to one another.

*A. Lawrence Lowell.*

[*To be continued.*]

ARBITRATION AS A CONDITION  
PRECEDENT.

ON the question of the validity and effect of a provision in a contract making arbitration a condition precedent to liability, great confusion and difference of opinion have arisen, chiefly through the promulgation of two irreconcilable principles of decision and the failure of the courts in many jurisdictions to meet the issue and clearly adopt and consistently follow one principle or the other. The primary purpose of this article is, by bringing the cases together, to show the uncertainty which exists, afford an opportunity for a comparison of the two doctrines, and make plain the necessity of a clear statement and steadfast following of one principle or the other. The final statement by the writer of his own views will not, it is hoped, interfere with the first object of this article as thus outlined.

In *Avery v. Scott*,<sup>1</sup> action was brought on policies of insurance, in which the following provisions were incorporated:—

“That the sum to be paid by this association to any suffering member, for any loss or damage, shall in the first instance be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society. And if a difference shall arise between the committee and any suffering member, relative to the settling any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another. And if the committee refuse for fourteen days to make such selection, the suffering member shall select two, and in either case the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute, according to the rules and customs of the club, to be proved on oath by the secretary. . . . And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the state-

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<sup>1</sup> 8 Exch. 497 (1853).



ment begun *de novo*. Provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association) that no member who refuses to accept the amount of any loss as settled by the committee, hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any action or suit."

The plaintiff brought suit without having referred his claim to arbitrators. The case was finally disposed of in the House of Lords, in 1856.<sup>1</sup>

In the Exchequer, judgment was rendered for the plaintiff. On writ of error the judgment was reversed in the Exchequer Chamber,<sup>2</sup> and in the House of Lords, also, judgment was given for the original defendant, but on much broader grounds than in the Exchequer Chamber. There is a clear issue between the Exchequer Chamber and the House of Lords as to the principle which should govern the decision. Coleridge, J., wrote the opinion of the court in the Exchequer Chamber, and succinctly expressed the governing principle of the court's decision in these words:—

"There is no dispute as to the principle. Both sides admit that it is not unlawful for parties to agree to impose a condition precedent *with respect to the mode of settling the amount of damage, or the time for paying it, or any matters of that kind, which do not go to the root of action*. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported. The only question is, whether this case falls within the one or the other description."

Addressing himself to this question, Coleridge gives a narrow interpretation to the agreement, construing it as giving to the arbitrators the determination not of the entire question of liability, but only of the question of damage: "It is like an adjustment, where some damage is admitted, and the only question is as to the amount." Thus Coleridge brings the agreement within his rule of a condition precedent with respect to the mode of settling a matter "of a kind which does not go to the root of the action."

<sup>1</sup> Scott v. Avery, 5 H. L. Cas. 811.

<sup>2</sup> 8 Exch. 497.

In the House of Lords a different view is taken. The opinions, were delivered by the Lord Chancellor and Lord Campbell, Lord Brougham concurring.

The Lord Chancellor: —

"If, in consideration of a sum of money paid to me by A. B., I agree with him that, in case J. S. should decide that A. B. had fulfilled certain conditions and had sustained certain damage, and J. S. should make his award accordingly, I would pay to A. B. the sum so ascertained and awarded, no right of action would exist until J. S. had made his award.

*"I do not go into that question, therefore, whether in this case, according to the true construction of the contract, the amount of damage alone is to be ascertained, because, in my view of the case, the principle goes much farther."*<sup>1</sup> It appears to me perfectly clear that, until the award was made, no right of action accrued, and consequently the judgment of the court below, reversing the judgment of the Court of Exchequer, and allowing the plea, was a perfectly correct judgment."

Lord Campbell: —

"In the first place, I think that the contract between the shipowner and the underwriters in this case is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and upon a deliberate view of the policy, I am of opinion that it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured.

"That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? . . . It is contended that it is against public policy; that is rather a dangerous ground to go upon. . . . Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract. Take the case of an insurance club, of which there are many in the North of England. . . . Is there anything contrary to public policy in saying that the Company shall not be harassed by actions the costs of which might be ruinous, but that any dispute that

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<sup>1</sup> The Italics are the writer's.

arises shall be referred to a domestic tribunal, which may speedily and economically determine the dispute? I can see not the slightest ill consequence that can flow from such an agreement, and I can see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract.

"Then, my Lords, when we come to the decided cases, if there had been any decision which had not been reviewed by your Lordships, which adjudged such a contract to be illegal, I should ask your Lordships to reverse it; for it would seem to me really to stand on no principle whatsoever. It probably originated in the contests of the different courts in ancient times, for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction. . . . But I am glad to think that there is no case that I am aware of that will be overturned by your Lordships' affirming the judgment now in dispute."

It would seem as if this language of the House of Lords in *Scott v. Avery* was sufficiently clear in repudiation of the doctrine that a condition precedent of arbitration is void if it goes to the entire question of liability. But if any reiteration of the broad doctrine of the Lord Chancellor and Lord Campbell in *Scott v. Avery* were needed to make that doctrine undisputed law in England, it is to be found in *Collins v. Locke*<sup>1</sup> and *Spackman v. Plumstead Board of Works*.<sup>2</sup> In the former case, Sir Montague E. Smith, delivering the judgment of their Lordships, says:—

"The question so raised is, whether the general arbitration clause affords an answer to the action, there having been no arbitration and no award under it.

"Since the case of *Scott v. Avery*, in the House of Lords, the contention that such a clause is bad as an attempt to oust the courts of jurisdiction, may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract, and the intention of the parties to be collected from its language."

In the case of *Spackman v. Plumstead Board of Works*, Earl of Selborne, L. C., in the course of his opinion, speaking of *Scott v. Avery*, says:

"In *Scott v. Avery* the question had to be considered upon the general rule of law that people could not by contract oust the jurisdiction of

<sup>1</sup> 4 App. Cas. 674 (1879).

<sup>2</sup> 10 App. Cas. 229 (1885).



courts of justice, on which had been founded a series of decisions, independent of course of recent statutes, as to the extent to which the courts would or would not enforce agreements to refer questions capable of being litigated in the courts of arbitration. The court had to determine whether that principle was applicable to a case in which it was part of the contract itself that the right of action, so to say, before it could arise, was to be ascertained by the decision of arbitrators; in which the right itself, the constitution of the right, was not to be perfect and absolute under the contract until arbitrators had decided something. The court held that to be perfectly good, and that in that case until such a decision had been made, no right upon which an action could be founded arose."

The doctrine of Coleridge, J., that an agreement between parties which gives to arbitrators the determination of the whole question of liability is void, even as a condition precedent, has however shown remarkable vitality. Even in England we find Brett, J., almost twenty years after the final decision in *Scott v. Avery*, in *Edwards v. Aberayron Mut. Ship Ins. Soc.*,<sup>1</sup> contending that *Scott v. Avery* did not decide that a condition is good which places in the hands of arbitrators the determination not merely of some particular point, as, for instance, the amount of the damage, but the whole question of liability. He therefore held that such a condition was bad as ousting the courts of their jurisdiction, and that the plaintiff's action would lie. Kelly, C. B., arrived at the same result, chiefly on the grounds stated by Brett, J. The decision in the case was in the plaintiff's favor, but Amphlett, B., whose opinion turned the scale, put his decision on quite a different ground from that taken by Brett, and on the question of the validity of the condition precedent was opposed to Brett and Kelly, and entirely in accord with Pollock and Archibald, and the three Judges of the Queen's Bench, Blackburn, Mellor, and Lush, who in that court had unanimously found for the defendant.

*Edwards v. Aberayron Mut. Ship Ins. Soc.* was decided before the broad doctrine of Lord Campbell in *Scott v. Avery* had been reiterated in *Collins v. Locke* and in *Spackman v. Plumstead Board of Works*. The extent of the decision in *Scott v. Avery* had, however, been fully recognized in the Exchequer Chamber in the cases of *Horton v. Sayer*,<sup>2</sup> with Pollock, Martin, Bramwell, and Watson sitting, and in *Tredwen v. Holman*,<sup>3</sup> with Bramwell, Martin and

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<sup>1</sup> L. R. 1 Q. B. D. 563 (1876).

<sup>2</sup> 4 H. & N. 643, decided in 1859.

<sup>3</sup> 1 H. & C. 72.

Wilde sitting. In *Dawson et al. v. Fitzgerald*,<sup>1</sup> Jessel, M. R., says as to *Scott v. Avery*: —

“I take the law as settled by the highest authority — the House of Lords — to be this. There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring or to apply under § 11 of the Common Law Procedure Act, 1854, to stay the action till there has been arbitration.”

In the case of the London Tramways Co., Limited, Appellants, *Bailey*, Respondent,<sup>2</sup> decided one year later than *Edwards v. Aberayron Mut. Ship Ins. Soc.*, and in the same court, Mellor, J. says: —

“If two persons choose to agree that neither of them shall have any right of action under an agreement until a third person has given his decision upon the matter in question, as in the case of a wager, etc., the agreement is binding. It is quite reasonable that people should endeavor as far as possible to avoid the necessity of having recourse to courts of law.”

As opposed to the doctrine so forcibly expressed in the House of Lords in *Scott v. Avery*, and clearly recognized in the later cases, the opinions of Brett and Kelly in *Edwards v. Aberayron Mut. Ship Ins. Soc.* cannot be regarded otherwise than as sporadic and as affording no reasonable ground for the statement of Field, C. J., in *White v. Middlesex R. R. Co.*,<sup>3</sup> that “*Scott v. Avery*, 5 H. L. Cases, 811, left it uncertain whether, if in a contract the agreement to submit to arbitration is a condition precedent to maintaining the action, and includes all disputes which may arise under the contract, and is not confined to questions which affect the amount of damages, it is or is not void.” But while it cannot fairly be said that it is left uncertain in England whether such a condition precedent is void, it may well be said to be left uncertain in most jurisdictions in the United States.

In *White v. Middlesex R. R. Co.*, *supra*, Field, C. J., says: —

<sup>1</sup> L. R. 1 Ex. Div. 257 (1876).

<sup>2</sup> L. R. 3 Q. B. D. 217.

<sup>3</sup> 135 Mass. 216.

"The inclination of this court has been to regard such an agreement as void," citing authorities.<sup>1</sup>

"If such an agreement in a contract is not void as contrary to the policy of the law, the whole doctrine amounts to this, that the courts will not specifically enforce the agreement, but will treat it as valid, and as a condition precedent, or as an independent stipulation, according to the construction given to the contract."

What Field, C. J., calls "the inclination of this court" seems to be strengthened in subsequent cases in Massachusetts, though the issue does not seem to be fairly presented and met in any case. The court has shown a strong tendency to go no further than the decision of the particular case has required, following the lead of Chief Justice Chapman, who in *Hood v. Hartshorn*<sup>2</sup> disposed of the case as follows: —

"The present case comes within the principle stated by Coleridge, J., in *Avery v. Scott*, 8 Exch. 500, that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damages, or the time of paying it, or any matters of that kind which do not go to the root of the action."

See *Reed v. Washington Ins. Co.*,<sup>3</sup> and *Hutchinson v. Liverpool, etc. Ins. Co.*<sup>4</sup> In the latter case Morton, J., says: —

"No question is made that the conditions in regard to submitting the amount of the loss to arbitration, and not bringing suit till after an award, are such as may be properly incorporated in a policy. They relate to the manner of arriving at the amount of the loss, leaving the question of the liability of the company untouched, and to be settled by application to the courts, or in such other way as the parties may agree. Such conditions in a policy have been held to be valid. *Hood v. Hartshorn*, 100 Mass. 117; *Scott v. Avery*, 5 H. L. Cas. 811."

See also *Haley v. Bellamy*,<sup>5</sup> and *Thorndike v. Wells Mem. Assoc.*<sup>6</sup>

In Maine the court says, in *Cushing v. Babcock*<sup>7</sup>: —

"Arbitration is a mode of adjusting disputes favored by the law. . . . Arbitrators are judges chosen by the parties themselves, and, at common

<sup>1</sup> *Cobb v. New England Ins. Co.*, 6 Gray, 192; *Rowe v. Williams*, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Vass v. Wales*, 129 Mass. 38. See also *Trott v. City Ins. Co.*, 1 Cliff. 439; *Mansfield v. Doolin*, I. R. 4 C. L. 17.

<sup>2</sup> 100 Mass. 117.

<sup>3</sup> 138 Mass. 572.

<sup>4</sup> 153 Mass. 143.

<sup>5</sup> 137 Mass. 357.

<sup>6</sup> 146 Mass. 619.

<sup>7</sup> 38 Me. 452.



law, their awards are not examinable, except on the ground of corruption, gross partiality, or evident excess of power. . . . It is competent for parties to liquidate, by agreement or arbitration, the amount for which judgment shall be entered up in actions pending in court."

In view of the benign consideration for arbitration expressed in *Cushing v. Babcock*, it might be thought that the court would see nothing contrary to public policy in a contract making the award of arbiters a condition precedent to action; but the court in later cases has squarely adopted the doctrine of Coleridge, J.<sup>1</sup> In *Dugan v. Thomas* the court says: —

"Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. But men cannot be compelled even by their own agreements to mutually agree upon arbiters whose duties would, as in this case, go to the root of the principal claim or cause of action, and oust the courts of their jurisdiction."

In view of the above decisions, *Perry v. Cobb*,<sup>2</sup> in which the doctrine of the prior cases is expressly affirmed, is interesting. The plaintiff was a member of the Knox Lime Insurance Association, the by-laws of which provided as follows: —

"Article 6th. — If a shipper receive notice of a cargo in trouble he is to notify the secretary or one of the committee in writing, but he, the shipper, to take full charge of the interest, and act for the best interests of all concerned with the advice of the committee or their agent, and when closed, to submit the result to the committee, and they are to determine the amount due, if any, and pay the same at their first regular meeting after the claim for loss is presented, unless the Association has insufficient funds, in which case thirty days time for payment shall be granted. An appeal may be made to a majority of two thirds of the votes of the Association, whose decision shall be final."

"Article 11th. — No suit in law shall be begun or maintained by one or more members against any other member or members of this Association, on account, or for any claim growing out of the same, except for the collection of the demand notes."

The plaintiff, having suffered damage to a cargo of lime, submitted his claim to the committee, and afterwards on appeal to the association. Both decisions were adverse to him. Thereupon he

<sup>1</sup> *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55; *Buck v. Rich*, 78 Me. 431; and *Dugan v. Thomas*, 79 Me. 221.

<sup>2</sup> 88 Me. 435 (1896).

filed a bill in equity against the members of the association, claiming the right to test his claim to indemnity in the courts *de novo*. The court disposed of Article 11th in summary fashion by saying that this was not a suit in law but a suit in equity. Dealing with the Sixth Article, the court says that it is not an agreement for arbitration, inasmuch as the parties by whom claims are to be passed upon are not disinterested parties but the contracting parties themselves; that the provision for submitting claims to the committee and on appeal to the association is an agreement as to mode of procedure among the members of the association *inter sese* and is binding on the members. The court does not, however, hold binding the provision that such decision shall be final, but, after saying that "in this proceeding the decision was in the nature of an award," treats of its effect as follows:—

"Why, then, should not this method, agreed to by the associates, have such force and effect upon a court of equity as the fairness of the investigation and deliberation of the decision indicate would be safe, work justice, and save expensive litigation to the parties, as it was originally intended that it should do? No good reason suggests itself, and some of the rules touching awards may safely apply. The opinion of the court in *Burchell v. Marsh*, 17 How. 344, upon a bill in equity to set aside an award of arbitrators, is very instructive. It holds that an honest decision upon a fair hearing should stand, although the court feels that it could have arrived at a better result; for otherwise it would be the 'commencement, not the end of litigation.' A judgment of Lord Thurlow is cited in confirmation of the doctrine. *Knox v. Symmonds*, 1 Ves. Jr. 369.

"In this cause the decision of the associates is not an award in the strict sense, but a procedure in an equitable controversy between joint associates, that determines their rights *inter sese*, and it should bind them, except for cause shown to the contrary. They are all interested parties, and that fact and the evidence adduced may show a denial of equitable relief that should be given, and it may show the reverse. At any rate, the whole cause may be heard anew to see if any such error or mistake intervenes as should change the result. The relief prayed for is equitable, and will be granted or withheld as sound discretion may demand."

In trying to get at the principle of this decision, the point that this is an agreement *inter sese*, on which the court seems to put much stress, can, it would seem, be eliminated in so far as it is relied upon as distinguishing this case from the ordinary case; for any arrangement which contracting parties make for the determina-

tion of a question of obligation between them is an arrangement *inter sese*, and certainly the fact that they agree upon disinterested parties to pass upon the question does not make it any the less an arrangement *inter sese*, or afford any reason for giving the determination less force or effect. For instance, suppose the by-law in this case had been that a committee of five, chosen each year from the past members of the association, should constitute the body to which the appeal should lie, instead of the association, and that the decision of that committee should be final. It is difficult to see how the court could logically refuse to give to such a provision at least as much effect as they gave to the by-law providing for an appeal to the association. If that is so, if any principle is to be adduced from the decision, it is that where parties contract that they will pay such sum, if any, as may be determined by certain other parties to be due, such a provision is binding on the parties as a mode of procedure, and the finding will be given much the same effect as an award, being reviewable by a court of equity, but reversible only on proof of fraud or manifest error. It must, however, be admitted that such a conclusion is hardly reconcilable with the doctrine laid down by the Main court in the prior cases expressly reaffirmed in this case.

The situation in the United States courts is equally interesting. *Fox v. The Railroad*,<sup>1</sup> in the Third Circuit, was an action of contract on an agreement, in which it was provided :—

“And it is mutually agreed and distinctly understood that the decision of the chief engineer for the time being shall be final and conclusive in any dispute which may arise between the parties of this agreement relative to or touching the same ; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy at law or otherwise by virtue of said covenant ; so that the decision of the engineer shall, in the nature of an award be final and conclusive on the right and claims of the said parties ; and the engineer being a stockholder of this company shall be no objection to his exercising the trusts and power herein granted to him.”

The plaintiff sued without submitting his claim to the engineer, and it was held that he had no cause of action, the court holding that the decision of the engineer was a condition precedent. Discussing the doctrine that such conditions precedent are void, as

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<sup>1</sup> 3 Wall. Jr., 243.



ousting the courts of their jurisdiction, the court, per Grier, J., says: —

“This obsolete dogma does not appear to have been received with approbation in Pennsylvania. In the case of *The Monongahela Navigation Co. v. Fenlon*, 4 Watts & Sergeant, 205, it was decided, etc. . . . That case governs the present, ‘as to every dispute arising relative to or touching the agreement’ declared on.

“Such a clause in contracts like those constantly made by corporations for great public improvements is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed, and not subjected to ingenious criticisms in order to support the jurisdiction of courts of law and encourage litigation.”<sup>1</sup>

But in the case of *Trott v. The City Ins. Co.*,<sup>2</sup> in the First Circuit, the opposite result was reached, the court adopting the rule of Coleridge, J. It is remarkable, however, that in this case, although decided in 1860, neither counsel nor court seem to be aware of the House of Lords decision in *Scott v. Avery*, but cite and discuss only the decisions of the Exchequer and Exchequer Chamber.

In New York the question has been gone into very fully in the case of *Pres’t, etc. D. & H. Canal Co. v. Pa. Coal Co.*<sup>3</sup>

The court says on the general question of agreements for arbitration:—

“It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction. The reason of the rule is by some traced to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced. An agreement of this character induced by fraud or overreaching, or entered into inadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance, or disregarded when set up as a defence to an action.

“But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and

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<sup>1</sup> Compare also *U. S. v. Robeson*, 9 Pet. 319.

<sup>2</sup> 1 Clifford, 439.

<sup>3</sup> 50 N. Y. 250.

the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstance entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule, or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than to enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified."

In the case before the court the parties had agreed that, if a certain canal was enlarged, the defendant company should pay an extra toll to be determined by three arbitrators chosen in a specified way. The court held that under the agreement such determination by arbitrators was a condition precedent to any liability for extra toll, and until such arbitration no action would lie for extra toll. It is to be noted, however, that the rule of Coleridge, J., would cover this case on its facts, and that the court in the course of a very long and elaborate decision does not make it entirely clear whether it places the case on the broad ground of condition precedent irrespective of the question whether the arbitration does or does not go to the whole question of liability, or whether it considers itself limited to the narrower doctrine of Coleridge, J.

The Supreme Court of Pennsylvania very early took broad ground on the question of agreements for arbitration, holding in the case of *Monongahela Navig. Co. v. Fenlon*,<sup>1</sup> decided in 1842, that the following agreement was valid and binding on the parties: "It is also mutually agreed between the parties to these presents, that in any dispute which may arise between the contractor and the company, the decision of the engineer shall be obligatory

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<sup>1</sup> 4 Watts & Serg. 205.

and conclusive, without further recourse or appeal."<sup>1</sup> In California, the tendency seems to be toward the doctrine of the House of Lords decision in *Scott v. Avery*.<sup>2</sup> In Wisconsin, the case of *Hudson et al. v. McCartney*<sup>3</sup> leaves the question in much the same way that it is left by the New York court in *Pres't, etc. D. & H. Canal Co. v. Pa. Coal Co.*

The last case to which the writer wishes to call attention is *Calvin et al. v. The Provincial Ins. Co.*<sup>4</sup> The defendant and another insurance company had insured a vessel which was sunk while being towed by the plaintiffs for her owners. An agreement was then entered into between the plaintiffs and the two companies, in which, after reciting that the liability for raising the vessel was undetermined, the plaintiffs undertook to raise her for a sum named, and it was agreed to submit to arbitration by whom such sum and the other expenses of repairing the vessel should be borne. The plaintiffs raised the vessel, and then sued the defendants on common counts for work and labor without any arbitration having been had. The case goes off in favor of the defendants on the ground of the form of action, but the court says as to the agreement: —

"There is not a word in this agreement by which the defendants admit liability for the raising or repairs, or contract that they will pay the plaintiffs anything until the question of their liability is decided. To found a claim upon the agreement, an award must be shown. It would be as reasonable to bring an action upon an arbitration bond conditioned to obey . . . an award, before the award is made, as to hold that on this agreement an action could be maintained under the circumstances."

The whole essence of the question under discussion in this article is contained in the few words of the court in this case. The sinking of the vessel gave rise to no liability of the plaintiffs to the defendants or *vice versa*, the only liability of either being to the owners of the vessel. Nor did the raising of the vessel of itself give rise to any liability on the part of the defendants to the plaintiffs. If the plaintiffs had raised her without any agreement on the part of the defendants, there would have been no claim of

<sup>1</sup> See also *Faunce v. Burke*, 16 Penn. St. 469; *Snodgrass v. Gavit*, 28 Penn. St. 221.

<sup>2</sup> *Holmes v. Richet*, 56 Cal. 307, and *Saucelito L. & D. D. Co. v. C. U. A. Co.*, 66 Cal. 253.

<sup>3</sup> 33 Wis. 331.

<sup>4</sup> 27 Up. Can. Q. B. 403.



liability. The plaintiffs must rely on the express contract of the defendants, and by that contract the defendants agree to pay the plaintiffs only when two things have happened; first, the raising of the vessel; secondly, the making of an award by the arbitrators. This is no ousting of the courts of any jurisdiction. The plaintiffs may go into court on that contract when they choose, but, if they have not submitted the matter to arbitrators, the court, though it has jurisdiction of the contract, cannot give judgment, for the reason that the things stipulated as conditions precedent to liability on the express contract have not happened, and there is no ground of liability in implied contract. As is well put, it is like a suit brought on a bond conditioned to obey an award before the award is made.

Pollock, B., in *Dawson v. Fitzgerald*,<sup>1</sup> says, "it has been shown, not only by decisions, but by legislation of late years, that the same pious reverence is not felt for litigation in open court that was felt in old times." To hold a defendant liable to action on such an agreement as is set forth in *Calvin v. The Provincial Ins. Co.*, without any performance or attempted performance of the condition precedent, would be to satisfy the demands of such pious reverence at the expense of justice. It may be that, if "two persons, whether in the same or a different deed from that which creates the liability, enter into a collateral and independent agreement to refer the matter upon which the liability arises to arbitration," such an agreement will not commend itself to the courts for specific enforcement, and will not therefore take away the right of action on the principal covenant. The refusal by the court to give specific effect to such an agreement is no encroachment on freedom of contract, especially if the right of an action at law for breach of the agreement is recognized, as it is in the opinion of Jessel, M. R., in *Dawson v. Fitzgerald*. It is with reference to such agreements that there arose "the unfortunate expression<sup>2</sup> that 'the jurisdiction of the court is ousted by the agreement of the parties.'" But where "the right itself is under the contract not to be perfect and absolute until the arbitrators have decided something," then there can in no sense properly be said to be an ousting of the jurisdiction of the courts, for the reason that, under the terms of the contract, until after the arbitration has taken place

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<sup>1</sup> L. R. 1 Ex. Div. 257.

<sup>2</sup> Bramwell, B., in *Norton v. Sawyer*, 4 H. & N. 643.

no cause of action has arisen from the jurisdiction of which the courts can be ousted. To disregard such a condition precedent is quite a different thing from the exercise of the court's discretion in the granting of specific relief. It is to remould the parties' agreement and to encroach grossly on their freedom of contract.

The ancient cases, as has been pointed out, do not involve in their result, though they may in their reasoning, any such encroachment on freedom of contract. In the light of the very general questioning and repudiation by modern jurists of the doctrine of the public policy on which those cases are based, it is submitted that courts which have not already passed on the question should hesitate long before applying that doctrine in a class of cases which are logically distinguishable, and where the application of the doctrine involves an anomalous violation of the principles of the law of contracts which was not involved in the ancient cases. Admitting some force in the ancient doctrine of public policy, the courts must, as in every case where public policy is alleged as a ground for departing from ordinary rules of law, weigh the alleged public policy considerations as against the evil involved in a legal anomaly. Some courts would undoubtedly say that it is on the whole better that parties should not rely on unjudicial minds to determine their rights. But it must be recognized that there are great and obvious advantages to the parties in avoiding litigation in court. Weighing all considerations, it is submitted that the possible evil of such a determination of rights is entirely overbalanced by the evil of holding a provision for such determination void as a condition precedent, involving as it does a serious violation of principles of law in imposing on the parties, as an express contract, a contract vitally different from that which they made.

*Addison C. Burnham.*

## RESTITUTION OR UNJUST ENRICHMENT.

IN the November number of Volume X. of this Review, Mr. Abbot criticises Professor Keener's book on Quasi-Contracts, and among other matters he finds the principle of "unjust enrichment" either a *petitio principii*, or "a redundant link in the chain of reasoning."<sup>1</sup> His reasoning is that since all unjust acts are not illegal, the term "unjust enrichment," by failing to give the rule of discrimination between unjust and illegal acts and those which are unjust and legal, is no rule at all. This would undoubtedly be true if it were admitted that all acts by which a man was unjustly enriched did not result in an obligation upon him to restore the value of his enrichment. But if that is not admitted, but on the contrary is denied, the logical difficulty with the definition disappears.

Does the principle then become redundant? I think not. The trouble in this case is, as I understand it, that, by reference to the standard of conscience in the legal definition, that standard becomes the "logically anterior principle," and the definition "incapable of a real application as a principle of jurisprudence."<sup>2</sup> But reference to a logically anterior principle is, as it seems to me, merely a logical necessity for any form of thought. Take any general proposition that you will, legal or lay, and a very slight analysis will show you that it is merely a reference to logically anterior concepts which are the real basis of any decision under the proposition in question. For example, the proposition that mutual promises create mutual obligations, is a reference merely to the concept of promises which is the real basis of decision in any given case as to the existence of an obligation. It can make no difference that in that case the concept of a promise is more easily grasped than that of injustice. That may be a reason of refusing to recognize the rule of "unjust enrichment" as a legal rule at all, but if so, it is a reason of policy, not of logic. In short, I think that all legal propositions simply consist in the reference of legal rights to certain concepts or standards which are determined without reference to legal facts at all, and that whatever faults a legal proposition may have, it is logically

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<sup>1</sup> Page 226.

<sup>2</sup> Page 225.



perfect so long as it does not so refer to legal concepts which cannot themselves be referred to lay concepts.<sup>1</sup>

But, further, I believe that reference to indefinite standards, such as that of conscience, is a common characteristic of legal rules. Take, for example, the rule of responsibility for unlawful acts, that none of their results create legal liability except those against which an ordinarily prudent man would have provided under the same circumstances. Surely the standard of what such results are in any given case is quite as incapable of precise definition as that of what acts are unjust.

Or consider the rule governing the extent to which one man may injure the property of another in the enjoyment of his own. *Sic utere tuo ut alienum non lædas*. The standard is really no other than that by which the interference of each with the enjoyment of his neighbors, balanced with his own enjoyment, results in the maximum of freedom, a rule quite as incapable of clear definition as that of injustice.

Moreover the whole jurisdiction of equity, albeit it is in many instances well defined at present, arose from and is being constantly based upon no concept more definite than that of the unconscionable conduct of men in the exercise of their legal rights.

I cannot think therefore that Mr. Abbot's criticisms are valid upon Professor Keener's theory in this regard. Whether that theory is borne out altogether by the cases, particularly in all its scope, is quite a different matter, and one which I cannot discuss here.

In the March number of the same volume of the Review, Mr. Abbot suggests as a substitute for Professor Keener's definition this: that the cases of so called unjust enrichment are all instances of the right of restitution upon the breach of a consensual obligation or upon a tort. I am not quite certain that he means the right of restitution to be a remedy, but I think he does, since he discusses it under the head of remedies and puts it among a schedule of remedies. The right itself is no more than the right of a plaintiff to be put in a position as good as that in which he was before the obligation or the tort.

The most important class of cases which will not fit such a definition are those of money paid under a mistake. Mr. Abbot calls

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<sup>1</sup> Of course a legal proposition may itself be reducible to other legal terms requiring themselves reference to terms, etc., until we reach purely lay concepts; hence it is only mediately that we can say that all legal principles refer to such concepts.

them instances of the breach of a consensual obligation to tell the truth,<sup>1</sup> and instances the action of deceit as an example of the remedy of damages upon the breach of that obligation.<sup>2</sup> The difficulty with the action of deceit for this purpose is, however, that it will not lie unless the defendant has been guilty of a conscious misstatement,<sup>3</sup> and under no circumstances for mere suppression of the truth, unless there is, in the words of Lord Cairns, "such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false."<sup>4</sup> But obviously, if damages are not given through the whole range of this supposititious obligation, and yet there is no reason from the nature of the remedy why they should not be given, it is only fair to assume that, if they are given upon any obligation at all (which I cannot for an instant allow), that obligation is itself limited by the condition upon which the remedy actually is granted. Such would be an obligation not to lie, and that will not serve for the cases of money paid under a mistake.

Nor can I find the necessary elements from which to deduce such an obligation from the facts in the cases of money paid under a mistake. The only undertaking possible under the circumstances would be a warranty that the facts are as the parties state them to be. Obviously one cannot promise that an existing fact is so, since a promise means an assurance that the promisor shall perform something. The only promise which the facts admit, therefore, is that, if the facts be not as they are stated, the man who makes the statement will put the other party to the negotiation *in statu quo*, which is simply a warranty of the truth of the statement.

Suppose that A. comes to B. and reminds him that he has executed to B. a mortgage long ago, which he says that he now wishes to pay. B. supposes that the bond has been cancelled before, and tells A. that he so understands it; but, learning from A. the contrary, and believing A.'s recollection to be true, he insists upon payment before giving a satisfaction of the mortgage.

<sup>1</sup> Pages 508, 509.

<sup>2</sup> Page 508.

<sup>3</sup> *Ormrod v. Huth*, 14 M. & W. 651 (1845) Ex. Ch.; *Arkwright v. Newbold*, 17 Ch. D. 301 (1881), C. A.; *Redgrave v. Hurd*, 20 Ch. D. 1 (1881), C. A.; *Joliffe v. Baker*, 11 Q. B. D. 255 (1883); *Derry v. Peek*, 14 App. Cas. 337 (1889); *Glasier v. Rolls*, 42 Ch. D. 436 (1889), C. A.; *Angus v. Clifford*, 91, 2 Ch. D. 449 C. A.; *Morgan v. Skiddy*, 62 N. Y. 319 (1875); *Kountze v. Kennedy*, 147 N. Y. 124 (1895); *Bowker v. Delong*, 141 Mass. 315 (1886).

<sup>4</sup> *Peek v. Gurney*, L. R. 6 H. of L. 377 (1873).

Afterwards the bond turns up cancelled, as B. supposed, and A. sues for money paid under a mistake. Surely it would be the height of absurdity to say that it is B. who has represented to A. a fact which is untrue. B. has simply accepted the money because of his belief in A.'s better memory of the facts. Clearly a theory involving the breach of a consensual obligation will not fit all the cases of money paid under a mistake.

But there is a worse difficulty. Suppose B. really had made the representation to A., and not A. to B. Does B. undertake to make A. whole, if A. takes his version of the story? We should all admit that he ought to make him whole, but does he actually mean to express that undertaking to A.? Both are supposed to believe the facts to be as B. states them, because only then is there a mutual mistake. Doubtless B. does mean, as Mr. Abbot says, that A. shall believe him to be telling the truth, but we must find an undertaking upon B.'s part to answer in case of his mistake, and the two things are very far from coincident. Is it not true, rather, that just in proportion as two men are really mistaken about facts, they do not think at all about the contingency of their error? It is only as they are in doubt that they provide for that; and in proportion as they are in doubt they are not mistaken, and if they are not mistaken the action will not lie for money paid under a mistake. Therefore we cannot say that there is that tacit understanding. The pity of it is that they do not think about the necessity of such an agreement at all. They might make such an agreement, but as a fact they do not. The case of a householder ordering supplies from a grocer, mentioned by Mr. Abbot, is quite different. The future payment of the householder is in the minds of both, else the grocer would not give up his goods or the householder would clear out the shop.

Another class of cases to which the "restitution theory" will not apply is that in which the defendant has received some of the consideration upon an illegal contract which he repudiates.<sup>1</sup> There is no obligation created by the agreement, so there can be no breach. In the same category are those cases where a defendant repudiates a voidable obligation; as where he was a minor or drunk or insane when he made it; or when it is the contract of a married woman under the old law; or where the contract was made in the name of one as principal by another acting as his agent, when

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<sup>1</sup> Keener on Quasi-Contracts, p. 267 *et seq.*



in fact he was not.<sup>1</sup> In all these cases it may be said that there was a real obligation, which was conditional upon ratification, — many will, of course, be offended at my grouping the last instance with the rest in this connection, — but it must be remembered that a conditional obligation before the condition happens can be broken no more than if it were no obligation at all. Hence in these cases there can be no obligation broken before ratification, though it is of course only in lack of ratification that the action in quasi-contract will lie.

Again, consider a contract within the Statute of Frauds. If the right of restitution be a remedy upon the obligation, it violates the statute, since it is then "an action upon the contract."

Still, again, take the cases in this country where one who fails in the performance of a contract, because it has become impossible, is allowed to recover what he has advanced, though the defendant be in no default.<sup>2</sup> It is true that it might here be urged that the defendant, having promised to perform, is in default really, though he has an excuse, so far as concerns the remedy of damages, in the prior default of the plaintiff, and that it is upon the defendant's actual default that the action is brought. This explanation falls to the ground, however, whenever the plaintiff's performance is an actual and not an implied condition to the defendant's performance. As the law has become actually settled, implied conditions are regarded as conditions in fact, though it is hard to see how they can be truly so regarded; and at all events no such distinction as is necessary under the argument suggested has been taken, and relief is granted in these cases without consideration of whether the plaintiff's performance was an actual or an implied condition to that of the defendant. In these cases it is the breach, not the obligation, that is lacking.

Finally, under the head of obligations, consider the case of subrogation, taken in its widest meaning. Suppose we should define it as a case where A., who has discharged an obligation of B. to a third person, is allowed to sue B. upon that obligation, though there was no obligation between A. and B. prior to the payment. It is of course the last fact which is important in the "restitution theory." Consider first the case where A. pays the burial expenses of one whom it is B.'s duty to bury, and is permitted to charge B. for them, though he paid them in B.'s absence and with-

<sup>1</sup> Keener on Quasi-Contracts, pp. 326-340.

<sup>2</sup> Ibid. p. 241 *et seq.*

out his request.<sup>1</sup> Again, consider the case where A. pays for the support of one whom it is B.'s public duty to support, a duty in which he fails, and where he may recover regardless of any contract upon B.'s part. No one will venture to suggest that A. in these cases sues as a member of the public towards whom the duty runs; he could then only prove his actual damages, and would add nothing to his rights by his payment. Such also is the case where B. has contracted to support a person, and A. discharges the duty in which B. fails.<sup>2</sup> Another instance is that of contribution between joint tortfeasors wherever that is allowed.<sup>3</sup>

Now in none of these cases is there any color of contract between the plaintiff and the defendant; hence I can see no escape from admitting them — if they are admitted at all — as exceptions to the "restitution theory" whenever an action at law is allowed concurrently with a bill in equity of subrogation proper.

Coming then to contribution between sureties, can we say of that as well that it is not dependent upon any contract between the sureties to make contribution to one another, since, if it is so dependent, it is only an instance of the remedy of damages upon that contract, as Mr. Abbot contends? The case of *Deering v. Winchelsea*<sup>4</sup> is, it seems to be conceded, one where contribution cannot be based upon any contract between the sureties, and therefore one where the "restitution theory" will not apply. It was a case where contribution was allowed between sureties for the same principal, when they had executed different instruments and at different times. Mr. Abbot meets the case by doubting its correctness, but in this I think he will admit himself in error, if he will consult the authority which now supports the doctrine.<sup>5</sup> But if this doctrine of contribution between sureties be correct, and if

<sup>1</sup> Keener on Quasi-Contracts, p. 341 *et seq.*

<sup>2</sup> Professor Keener (p. 351), it is true, confines the remedy in this case to subrogation in equity, but as there is no more trouble upon the common counts in this case than in that of the discharge of a public duty, the only objection to the action at law seems to me to disappear.

<sup>3</sup> Keener, pp. 408, 410.

<sup>4</sup> 2 B. & P. 270.

<sup>5</sup> *Mayhew v. Crickett*, 2 Swanst. 185; *Whiting v. Burke*, L. R. 10 Eq. 539, and s. c. on appeal, 6 Ch. App. 342; *Stirling v. Forrester*, 3 Bligh, 575; *Ramskill v. Edwards*, 31 Ch. D. 100 (*semble*); *Craythorne v. Swinburne*, 14 Vesey, 160 (*dictum*); *Duncan v. N. & S. Wales Bank*, 6 App. Cas. at p. 19 (*dictum*); *Norton v. Coons*, 6 N. Y. 33; *Armitage v. Pulver*, 37 N. Y. 494; *Chaffee v. Jones*, 19 Pick. 260; *Monson v. Drakely*, 40 Conn. 552; *Mills v. Hyde*, 19 Vt. at p. 64 (*dictum*); *Campbell v. Mesier*, 4 Johns. Ch. at p. 338 (*dictum*). I have made no effort to make an exhaustive collection.



the reasoning by which the judges deduce the doctrine be correct, i. e. that contribution is in all cases a right of merely equitable basis and independent of contract between the sureties, then we have another exception whenever the remedy in equity is supplanted by an action at law.

So much for the cases in which there seems to be no breach of consensual obligation. How is it when the defendant has derived some advantage from the plaintiff by some act of his own, and not because it was given him freely? There are the well recognized cases of actions to recover the value of what one may have gained by an admitted tort; these we may pass, as they clearly do belong in the "restitution theory." But there are others which do not seem to fall in line. Take, for example, the case of money paid to satisfy a judgment which is afterwards reversed.<sup>1</sup> Suppose—to put the strongest case for a tort—the judgment creditor has actually levied or threatened to levy an execution. There is no wrongful act in any case; he has a perfect obligation which he does right to enforce, the only trouble being that, if he waited, that obligation would, as it afterwards turns out, become invalid. That does not make the past execution in any sense illegal, however; the defendant now simply holds what he has wrongfully, *ex æquo et bono*; that is the whole story.

Those cases in which an action is allowed for money extorted under threats to commit some tort at least are doubtful in our connection. The threat to commit a tort is not necessarily itself a tort. Suppose A. threatens to convert B.'s goods, and B. seeing no way to prevent the act and knowing that his remedy at law will be ineffectual, sells at a sacrifice. Or suppose that A. threatens B. wrongfully with imprisonment, A. being a sheriff, and B. leaves the county for a time and his business suffers. Or suppose that A. threatens to induce B.'s workmen to leave him, and A. refuses large contracts from fear of the threat. Suppose in each case B. acted as every prudent man would act who sought to avoid loss. Will it be insisted that A. is responsible in damages for the loss? Perhaps he is; the field of torts is an indefinite one, and constantly widening to-day, but he would be a bold man who could say with certainty that such an action does lie. But the action for money had is unquestionable, if under the threat A. extorts money from B.<sup>2</sup> Moreover, it is not in the judges'

<sup>1</sup> Keener, p. 417 *et seq.*

<sup>2</sup> *Ibid.*, Chapter XI.



minds an action upon a tort at all. We must conclude, therefore, that these cases of duress are not instances of restitution for a tort.

All these are instances of exceptions to the theory suggested by Mr. Abbot; but there is another objection which goes to the definition itself, so far as concerns the cases where money paid or the value of goods or services rendered is recovered, because the defendant refuses to perform a valid obligation by virtue of which he obtained the benefit. Mr. Abbot's theory regards these cases as instances of a remedy upon such obligations. But this cannot be supported, I conceive. A remedy is an obligation destined to stand in the place of the plaintiff's rights, and be, as nearly as possible, an equivalent to him for his rights. Wherever the plaintiff has the right to the performance of some act by the defendant, that only can be a remedy to him for the defendant's failure to perform which is an equivalent to such a performance. But, obviously, to replace the plaintiff in his position before the defendant incurred his obligation is no equivalent to the plaintiff for the performance to which he had a right. It is not his former position which should be restored, but his future position which should be realized. It is only when the infraction of the plaintiff's right consists in a change from his former position that restitution can be a remedy, that is, when there has been a tort or the breach of a negative obligation; but where the infraction consists in a failure to act at all, the only remedy possible is a change in the plaintiff's former position, not a renewal of it.

Moreover, it seems to me that even were the "restitution theory" not intended as a doctrine of remedies at all, but merely as a rule that the right of restitution is given upon the breach of a consensual obligation, it cannot be supported without modification. The breach of such an obligation does not *ipso facto* give the right of restitution or rescission. It is only when the breach is so important as to make further continuance in the contract inequitable, that the other party is permitted to rescind the transaction and recover what he has advanced.<sup>1</sup> Where it is not, he must continue in his performance, and sue for damages upon the breach that has occurred, giving the defendant opportunity to fulfil his contract for the rest. The question is really quite the same as that which comes up in the case of so called implied

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<sup>1</sup> Keener, pp. 303, 304.

conditions to a contract containing mutual obligations. Is it fair that one party should be compelled to go on and be content with his remedy for the breach of obligation by the other party, or is it fairer that, because of the breach already occasioned by the other party, he should be excused? That is a question which has been gradually settled by the rule that breaches going to the essence do excuse, others do not. Therefore, if the restitution theory be admitted at all of consensual obligations, it can be only with this modification, and it involves essentially equitable considerations. But it is only as the theory avoids the necessity of such considerations that it has its great merit as a theory; consequently this would seem to be a serious criticism, if it be a correct one, upon its application.

My conclusion is this: that Professor Keener's principle is logically perfect and of a kind far from anomalous; that the "restitution theory" will not apply to those instances of "quasi-contract," which are many, where there is either no obligation broken or no tort; that in the case of positive consensual obligations restitution cannot be regarded as a remedy at all; that in the case of all obligations, positive and negative, it does not follow *simpliciter* upon the breach, but only when special circumstances make it equitable that it should be given; and, in short, that it is only in the case of admitted torts that the theory has any application.

In the cases I have chosen as examples in what has been said, I have tried to illustrate only such rules as are well settled in one or more jurisdictions. There are several cases mentioned in Professor Keener's book which well illustrate the fact that quasi-contract is not a matter of consensual obligation at all, and which I have omitted; but the validity of such decisions might be questioned, and their discussion would take more space than their authority would add weight to my argument.

Mr. Abbot's theory I could wish were the law, because it is clear, precise, and manageable, but of course that is a very different question from whether it actually is the law. I am inclined to believe that it is not.

*Learned Hand.*

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	1889-90	1890-91	1891-92	1892-93	1893-94	1894-95	1895-96	1896-97	1897-98
Res. Grad.	—	—	—	—	—	—	—	—	1
Third year	50	44	48	69	66	82	96	93	130
Second year	59	73	112	119	122	135	138	179	157
First year	86	101	142	135	140	172	224	169	216
Specials	59	61	61	71	23	13	9	31	41
Total	254	279	363	394	351	402	467	472	545

In spite of the continued operation of the new rules on admission, the first year class is nearly as large as that of two years ago, which has hitherto been by far the largest on record. The size of the third year class is one of the most noteworthy facts appearing in the table; it is unprecedented. The actual percentage of second year men not returning is 28, as against 36, 30, 34, and 44, respectively, in the four preceding years. The percentage of men failing to return for their second year is strikingly less than ever before, being only 7, as against 23, 28, 24, and 27, respectively, in the four preceding years. The number of men withdrawing or not taking examinations continues small; last year there were nine per cent in the first year class, and three per cent in the second year class. The total number of men in the School is consequently larger than ever before, running considerably above the 500 mark; a result very gratifying, yet also a little inconvenient while our accommodations remain unenlarged.

The following are the usual tables showing the sources from which eight successive classes have been drawn, both as to previous college training and as to the geographical districts from which they have come: —



Class of	HARVARD GRADUATES.			Total
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91

Class of	GRADUATES OF OTHER COLLEGES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109

Class of	HOLDING NO DEGREE.			Total.	Total of Class.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.		
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216

The following thirty-eight colleges have conferred their first degrees on members of the entering class, the figures indicating the number of men from each college, where there are more than one: Yale (23), Amherst (10), Princeton (8), Boston College (6), Brown (6), Dartmouth (5), Williams (4), University of California (3), Cornell (3), Holy Cross (3), University of Wisconsin (3), Bowdoin (2), University of Chicago (2), De Pauw University (2), University of Pennsylvania (2), Mass. Inst. of Technology (2), University of Michigan (2), Stanford University (2), Trinity (2), Alfred University, Bates, Bucknell University, Colby, Delaware State College, University of Georgia, Georgetown, Indiana University, Iowa College, Johns Hopkins, University of Kansas, Knox, University of Missouri, Notre Dame, Oberlin, University of Vermont, Washington and Jefferson, Ohio Wesleyan, University of Wooster. The increased number from Yale and from Boston College is particularly interesting.

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MR. JUSTICE FIELD'S RETIREMENT.—The judicial service of Mr. Justice Field, now ended by his resignation from the Supreme Court of the United States, has been notable alike for its duration, the dignity of the positions held, the critical character of the times, and the quality of the man. Mr. Justice Field was a member of the Supreme Court of the United States for a longer time than Chief Justice Marshall sat in that body, for a longer time than Lord Mansfield or Baron Parke were

Judges of England; and if one counts in the years when he was a member of the Supreme Court of California, his judicial career is longer than Parke's had been, when, after having for many years given his opinions in the House of Lords as Lord Wensleydale, he died at the venerable age of eighty-five. Stephen J. Field has been one of the most active figures in the highest court of this country, than which no more important tribunal exists. Appointed by President Lincoln to this position during the stormy days of the war, he served through the no less critical time of the reconstruction of the Union, a period in which were brought before the Supreme Court questions more intimately concerning the life of the nation than any which had arisen since the time when the main principles of the Constitution had first to be expounded. And in the enormous number of judicial opinions written by him during all these years, it may be said that Mr. Justice Field has uniformly displayed independence of view, vigor of expression, and a high notion of the importance of his office. The same qualities of courage and energy which made him a leader of men in the stirring days of the settlement of California have made him always a prominent figure upon the bench where he sat so long.

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TROVER FOR REAL ESTATE?—In the late Massachusetts case of *Rogers v. Barnes*, 47 N. E. Rep. 602, the plaintiff gave the defendant a mortgage of land conditioned on payment of the debt within a year. Before default, the defendant made a false affidavit of default, and conveyed under the power of sale to Reed, who reconveyed to the defendant. After the year, the mortgage debt being still unpaid, the defendant conveyed by warranty deed to Rice, an innocent purchaser, who got a clear record title. Plaintiff then sued defendant in tort for the value of the land. The court held that, even though Rice took subject to plaintiff's right to redeem, the defendant was liable, as the plaintiff had the option to follow the land or to recover the value from the defendant, thereby confirming the title in Rice. Allen, Holmes, and Knowlton, JJ., dissented. The court do not seem very clear as to the grounds of their decision. At first sight the decision seems to rest on a doctrine which would apply the rules of trover to any case of disseisin; but it is hardly to be presumed that the court intended to lay down such a principle; and the case should, therefore, be considered as relating solely to the law of mortgages.

Owing mainly to the loose use of terms, there is much uncertainty as to the nature of the interests of a mortgagee and a mortgagor. It seems clear, however, that in Massachusetts, before default, a mortgagee has a legal fee subject to a legal right in the mortgagor. *Holman v. Bailey*, 3 Met. 55. After default, a mortgagee has a legal fee subject to an equitable right in the mortgagor. 1 Jones on Mortgages, 5th ed., p. 25, note 1. The mortgage debt in this case not being paid when due, the plaintiff's right became equitable. The court admits that Rice held subject to plaintiff's equity. Under these circumstances, why should the plaintiff have such an option as is given him in this case?

Where personalty is converted, optional remedies are given because, as the property may be removed or destroyed, there is no certainty of recovering it. Where there is a breach of trust the *cestui* has optional remedies, because he may not get the property unless he proves notice. In the case in question the recovery of the property is certain if the plaintiff pro-

ceeds properly. The right to redeem, together with a claim against this defendant for slander of title, seems to be all that plaintiff needs; and the law does not create unnecessary remedies. Much of the reasoning which allows the option here would apply to the case of a disseisin, but a disseisee has no option. *Brigham v. Winchester*, 6 Met. 460, (not noticed by the court in this case). Directly opposed to *Rogers v. Barnes* is *Winslow v. Clark*, 47 N. Y. 261. As the court have not made their position clear, it is difficult to criticise the case, but the objections to it may be summed up by saying that it makes an innovation the extent and effect of which it is impossible to determine, and as a consequence renders the law of real property uncertain.<sup>1</sup>

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**LIBEL — CONFLICT OF LAWS.** — In the case of *Machado v. Fontes* [1897] 2 Q. B. 231, the Court of Appeal has handed down a decision that is worthy of note. The court holds that if, while A and B are both in Brazil, A publish in regard to B an article which is not actionable according to Brazilian law, and which is not published in England, an action for libel may nevertheless be maintained by B against A in an English court. The cases cited, *Phillips v. Eyre*, L. R. 6 Q. B. 1, and *The Moxham*, 1 P. D. 107, support the decision only by *dicta*. Putting aside the question of precedent, however, it is hard to see how the case can be supported on principle. It is a recognized doctrine of private international law, that the courts of one country will, generally speaking, enforce obligations arising under the laws of another sovereign state. Wharton, *Conflict of Laws*, §§ 393 *et seq.* This case goes much further. There is no obligation incurred here to be enforced; for by the law governing the parties at the time of the act complained of no right was created in favor of the plaintiff against the defendant. To attempt to sustain the case on the ground that the act would be a libel by English law, would be to encroach upon one of the fundamental principles of international law, that of the territorial sovereignty of independent states. Wharton, *supra*, § 477; *Cope v. Doherty*, 4 Kay & J. 367.

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**PRECATORY TRUSTS.** — It is doubtful if there is any more striking example of mistaken kindness than the exceeding diligence with which courts of equity were formerly wont to find declarations of trust when in simple fact none such existed. In wills, for example, particular words were seized on as imposing a legal obligation, although their ordinary meaning implied something quite the contrary. The intention of the testator was correctly and universally held to be the test; but in discovering this intention courts of equity seem not infrequently to have fallen into an obvious error of simple logic. The question, of course, is not whether the testator intends his property to go in the way he recommends, but whether he means the first taker to be legally bound to carry out what is undoubtedly his desire. It is not suggested that the courts deliberately ignored this distinction, but it is apparent that they frequently failed to keep it precisely and clearly before them. *Harding*

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<sup>1</sup> It may be proper to say that Professor Gray, who was counsel at an application for a rehearing in this case, is in no way responsible for the appearance of this note in the REVIEW. — ED.



v. *Glyn*, 1 Atk. 469. In many cases this led to lamentable results. When, for example, after a devise or bequest, words indicative of hope or confidence were added, with an indefinite object, the trust, which the courts by the peculiar reasoning adopted were bound to find, failed entirely, and the first taker became constructive trustee for the heirs or next of kin. Thus the testator's evident intention was defeated by a rule, whose only excuse for existence was that it carried out such intention.

Happily there is to-day a reaction from this unfortunate kindness. A recent illustration of this is furnished by the case *In re Williams*, [1897] 2 Ch. 12. There the English Court of Appeal held that a devise by a testator absolutely to his wife, "in the fullest trust and confidence that she will carry out my wishes in the following particulars," did not impose a legal obligation on the wife, and that she took unrestricted. In the course of his opinion, A. L. Smith, L. J., makes an exceedingly pertinent remark which indicates what is the wholesome and reasonable rule to apply in this class of cases. He says, "I cannot understand, if he had intended an obligation by way of trust, why he did not say so."

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TRADE SECRETS. — The development of the law in regard to the relations between confidential servants of an inventor and their master is well illustrated in the recent case of *Thum Co. v. Tloczynski*, 72 N. W. Rep. 140 (Mich.) The plaintiff is a manufacturer of a fly-paper by a secret though unpatented process. The defendant learned the secret while in the plaintiff's employ; and a decree was granted restraining him from communicating that secret to a third party. The result reached is not a new one; as long ago as 1851, it was held that an employee learning the recipe of a medicine from his master was not at liberty to make use of his knowledge either in imparting it to another or in starting a rival business of his own. *Morison v. Moat*, 9 Hare, 241. And more recent authority in America seems to have established complete equity jurisdiction over this class of cases. *Tabor v. Hoffman*, 118 N. Y. 31.

The grounds for the assumption of control by equity over these questions between inventor and employee are not satisfactorily determined. In cases where there is an express contract by the employee not to reveal the secrets of the employment the matter is simple. Often, however, as in the case at present under consideration, there is no such contract; and here, although the court uses language suggesting that there was a breach of confidence, it seems to feel the necessity of implying a contract. The theory of implied contracts, however, is overworked; and in the present case there seems to be a remedy which does not necessitate taking liberties with the facts. This remedy is the ordinary one for breach of trust. It does not depend on any contract, express or implied; for where circumstances create a fiduciary relation it makes no difference whether the trustee has contracted to carry out the trust or not. Many trusts are created in which the agreements between the parties would be held invalid for want of consideration if looked upon as common law contracts; yet the fiduciary is held bound as a trustee. The inquiry to be made in the present case is whether the confidential employee stands in the position of a trustee, so that in revealing his secret he is guilty of bad faith in the view of equity; and the answer must be that in all respects he does stand in such a position. The *res* which he holds in trust is his knowledge of his employer's secret; this knowledge is intrusted to

him by his employer; and he holds it subject to the obligation of using it solely for his employer's benefit during the service, not betraying it at any time to a stranger to the employment, and not in any way using it against the employer after the term of service is ended. This doctrine was carried to its logical development in *Morison v. Moat, supra*. There it was held that, if the person who receives the secret from the confidential employee is a purchaser for value without notice, he has a full right to use the secret; but if, on the other hand, he is a mere volunteer deriving benefit under a breach of trust, he acquires no beneficial interest in the secret. It seems then that the confidential employee is regarded as a trustee as fully as if the *res* had been, for instance, real estate or stocks and bonds; and the purchaser from him is looked upon in the same light as the purchaser from a trustee of an estate. It is suggested that this is the true principle to apply to the present case; even if no grounds for implying a contract had appeared, the defendant could be restrained from committing a breach of trust.

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MAY THE STATE IMPEACH ITS OWN WITNESSES? — That a party cannot impeach the character of his own witness seems to be an established principle of the common law. A generally recognized exception to this rule, however, permits the impeachment of an attesting or subscribing witness to a deed or will. The Supreme Court of Vermont, in a recent case, *State v. Slack*, 38 Atl. Rep. 311, has extended this exception by holding that the State may impeach its own witnesses in criminal cases. Apparently there is no authority for such a proposition. It is believed, furthermore, to be untenable on principle.

The reason usually assigned by the courts for making an exception in the case of witnesses to an instrument is that, inasmuch as a party is compelled by law to call such witnesses, he does not therefore present them to the court as worthy of belief. Precisely the same ground underlies the decision in *State v. Slack, supra*. The court holds it to be "the duty of the State to produce and use all witnesses within reach of process, of whatever character, whose testimony will aid the jury in arriving at the truth, whether it makes for or against the accused, and that, therefore the State is not to be prejudiced by the character of the witnesses it calls." In another place the court says that "the State is bound to call all the witnesses," not being "at liberty to choose and to call whomsoever it will."

If a literal construction of this language be adopted, the court certainly seems to regard it as obligatory upon the State to call every possible witness, including the defendant and the defendant's witnesses. Clearly, in many instances, such a rule could not possibly be put into practice. Even where practicable, it would often result in a needless waste of time and money. Conceivably the court merely means that the number of witnesses in a given case being necessarily limited to such as happen to be cognizant of the facts the State is consequently obliged to call such persons, and should therefore be entitled to impeach their character. This reasoning, however, would operate equally well in favor of the prisoner and both parties to a civil suit; and were such a doctrine thus extended by the courts, the general principle that a party cannot impeach his own witness would have no significance whatever.

In granting to the State this privilege of impeaching its own witnesses,



the court proceeds upon the theory that the State's officers, far from having private interests to subserve, are engaged in the duty of securing equal justice to the State and the accused, and should not, accordingly, be hampered by "a rule without a reason." It is difficult to see, however, why this doctrine is not directly contrary to the prevailing notion that it is the prisoner, and not the State, who is entitled to every protection and advantage possible.

It is submitted that the Vermont court has failed in its attempt to bring the present case within the exception as to instrumental witnesses; for surely the State, like any other party, is "at liberty to choose and to call whomsoever it will." Apparently, therefore, the decision is squarely at variance with the general rule under discussion. That rule may be lessened in significance by restriction within narrow limits. The reasoning underlying it may be subject to criticism. But the rule itself still remains a principle of the common law, and should be abolished, if such action seems desirable, not by judicial decision, but by an act of the legislature.

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ADMINISTRATION OF THE ESTATE OF A SUPPOSED DEAD MAN. — The administration in a probate court of the estate of a living man appears at first sight such a palpable absurdity, that it is astonishing that any one should contend for the validity of such a proceeding, and still stranger that any legislature should think of giving legal effect to it. Nevertheless, this has been done. In *Roderigas v. East River Savings Institution*, 63 N. Y. 460, the court, with the aid of a statute, refused to allow a distribution of a supposed decedent to be disturbed. This New York case, it is believed, stands absolutely alone. The recent case of *Carr v. Brown*, 38 Atl. Rep. 9 (R. I.), represents, however, an attempt to obtain the same result from a Rhode Island statute. This statute provides that when a man has been absent for seven years, and nothing heard from him during that time, the probate court shall have power to grant administration of his estate as if he were dead. The court refused to consider such an administration as valid, as against the supposed decedent, particularly on the ground that the statute is contrary to the provision of the Fourteenth Amendment to the United States Constitution, that no State shall deprive any person of his property "without due process of law." In support of this position they cite an overwhelming weight of authority. Nothing is better established than that, in the absence of statute, the jurisdiction of a probate court depends on the actual fact of the death of the person whose estate is to be dealt with. In point of theory, the question whether the judgment of the court ought, or ought not, to be conclusive on that fact is not so simple as it may appear. The judgment should be conclusive as to all the facts found in it, as against all parties to the suit. In the case of a judgment *in rem*, all persons are made parties for this purpose who have received either actual notice of the suit, or constructive notice from the public seizure of the property by the court. If a probate court proceeded *in rem*, and seized the property before giving judgment, then perhaps advertisement of the seizure might be held to give constructive notice of the suit to the absent owner, and he might be concluded from disputing the judgment. The probate court, however, has never been regarded as proceeding *in rem*, nor does it take possession of the property concerned before granting the letters of administration.

Whatever might be the effect of this Rhode Island statute, in the absence



of any constitutional restriction, it would seem clear that the Fourteenth Amendment makes it impossible to hold valid any administration of the estate of a living man. A probate court, which is essentially a court of very limited jurisdiction, acting without a jury, has never been legally empowered to meddle with the goods of any living person, nor can it do so by any "due process of law."

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NATURAL GAS — POLICE POWER. — The Supreme Court of Indiana has decided in the case of *Townsend v. State*, 47 N. E. Rep. 19 (Ind.), that an act forbidding the burning of natural gas in flambeau lights is not unconstitutional; being a legitimate exercise of the police power. It is possible to agree with the decision of the court on the ground that the law is simply a prohibition of the use of property in a manner contrary to public policy. This, however, does not at all imply a concurrence in what seems to be the chief ground for its decision. This is based chiefly on the analogy, drawn by a Pennsylvania court in *Gas Co. v. De Witt* (130 Pa. 235), between water, gas, and oil, and animals *feræ naturæ*, in that each of these substances becomes private property only on being reduced to actual possession, and the State, as holding the property for the benefit of the people at large, may decide on what terms it shall be reduced to private possession. So far, this analogy, although at first sight fanciful, seems quite correct on principle. *Gas Co. v. De Witt, supra*; *Gas Co. v. Tyner*, 131 Ind. 277; Gould, Waters, 2d ed., § 291.

When the court comes to its conclusion, however, the argument by analogy fails. The court reasons that, as the game laws, which regulate the capture of animals *feræ naturæ*, have been held constitutional, this present law, which regulates the use of a mineral "*feræ naturæ*," must also be held constitutional. It is submitted that the argument of the court is not sound. The scope and aim of the two laws are quite different. If the Indiana statute were analogous to the game laws, it would have for its subject matter the regulation of the conditions on which, or the ways by which, individuals could take possession of portions of the natural gas of the State. It does nothing of the sort. It does not at all deal with the question of how, or under what conditions, natural gas may become individual property. Assuming that the gas has already been reduced to possession, it concerns itself only with the manner in which he who has become the owner shall use his property. For this reason it would seem that while the decision of the court, as said above, may be correct, the analogy which forms its chief support in the opinion is of no value.

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THE RIGHT TO USE THE MAILS. — The United States Circuit Court has recently rendered an interesting decision relating to the right of a citizen to use the government mail system. In the case of *Hoover v. McChesney*, 81 Fed. Rep. 472, the plaintiff, secretary of the Southern Mutual Investment Company, claimed that the defendant, a postmaster, wrongfully refused to deliver his mail. The defendant admitted the withholding, but justified it by two orders of the Postmaster General, alleged to be issued, in pursuance of certain acts of Congress, because the Postmaster General believed the company and the plaintiff were engaged in conducting a lottery contrary to law. The court held that the defendant was justified in withholding mail matter addressed to the

company or its officers, but was not so justified as to matter addressed to the plaintiff personally, and not as an officer of the company.

It is conceived that the court was correct in its conclusion. To hold the contrary, indeed, would be to assert that an executive officer has the right to determine what person or persons shall be excluded from the right to use the mail service; and such a doctrine, it would seem, is not only entirely inconsistent with a proper sense of justice, but unwarranted by the authorities.

The injunction in the present case was granted upon two grounds. The court says, in the first place, that the plaintiff, as a citizen of the United States, had a property right in the use of the mails, and that the action of the postal authorities deprived him of that right without due process of law, thus violating the Fifth Amendment to the Constitution of the United States. It is submitted that this view, which illustrates strikingly the present tendency of courts to interpret the Fifth Amendment liberally, goes too far, and puts a meaning on the word "property" not contemplated by the framers of the Constitution. The court claims also that the transaction amounted to a violation of the Fourth Amendment, securing the people against unreasonable searches and seizures of their papers and effects. This is believed to be the correct ground upon which to rest the decision, for the right secured by the Fourth Amendment extends to private papers in the mail as well as to those in one's own household.

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## RECENT CASES.

**ADMIRALTY — JURISDICTION — LIENS UNDER STATE STATUTE.** — A Massachusetts statute gave a lien for repairs and supplies furnished in the home port. *Held*, that the process was one *in rem*, and enforceable exclusively in the Federal District Courts, and the State Courts had no jurisdiction. *The Glide*, 17 Sup. Ct. Rep. 930; *Atlantic Works v. Tug Glide*, 157 Mass. 525, reversed.

The reasoning is briefly stated at the end of the opinion. By the laws of the United States the Federal District Courts have exclusive maritime and admiralty jurisdiction; the lien on a vessel is a *jus in re* and a maritime lien to secure the performance of a maritime contract, and equally within the maritime jurisdiction whether created by the common law or by statute. Although the common law gave a lien for repairs furnished a foreign vessel and the Federal courts had exclusive jurisdiction, *The Moses Taylor*, 4 Wall. 411, it gave none for those furnished to a home vessel. Such a lien, if it existed, would be enforced in the same way and be subject to the same jurisdiction as one existing without a statute. *Atlantic Works v. Tug Glide*, *supra*, Morton, J., dissenting. The statute gives the cause of action; the exclusive jurisdiction existed before. The characteristic opinion by Mr. Justice Gray presents a full review of the authorities.

**CONSTITUTIONAL LAW — COLLATERAL ATTACK — DE FACTO OFFICER.** — A was convicted in a city police court created under a statute which was unconstitutional because it did not properly classify municipal corporations. On petition for *habeas corpus*, *held*, that the constitutionality of the statute was open, and that A was entitled to release as, the police court having no legal existence, the judge was not a *de facto* officer and his acts were void. *Ex parte Giambonini*, 49 Pac. Rep. 732 (Cal.).

While professing to follow *Buck v. City of Eureka*, 109 Cal. 504, the judge really disregards the rule which he himself laid down in that case. There a statute authorized a council to create an office to be filled in a certain manner. The office was not created, but a person appointed in the manner specified acted as officer and was generally recognized as such. He was held to be a *de facto* officer, as the office had a potential existence under the statute. In the principal case it was not claimed that a city police court could not exist under the Constitution; the only objection to the statute was that it contained improper classifications. It is hard to see any more potential existence in an



office which a statute authorizes a council to create than in one which a constitution authorizes the legislature to create. By the same principle of public policy, the acts of the officers under the statute and under the Constitution should be protected from collateral attack. *State v. Carroll*, 38 Conn. 449; *State v. Gardner*, 54 Ohio St. 24. A very different question arises if the legislature attempts to substitute a statutory office for one expressly recognized in the Constitution, as in *Norton v. Shelby County*, 118 U. S. 425, where the court allowed collateral attack.

**CONSTITUTIONAL LAW — ENACTMENT OF STATUTES — IMPEACHMENT BY JOURNALS.** — To ascertain whether or not the legislature in the passage of a bill complied with the requirements of the Constitution, the court may go back of the enrolled bill to see if the journals of both houses of the legislature show that the requirements of the Constitution were obeyed. *Cohn v. Kingsley*, 49 Pac. Rep. 985 (Idaho).

An enrolled act, signed by the proper officers, and filed in the office of the Secretary of State, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act. *McKennon v. Cotner*, 49 Pac. Rep. 956 (Oreg.).

The above cases bring out sharply the divergence of opinion which exists as to the effect which should be given the enrolment of a statute. See 10 HARVARD LAW REVIEW, 380. The only view which can be supported on sound principle is that the certificate of enrolment is unassailable by the journals of the legislature, whether to show an omission of an amendment, or a failure to comply with some form required by the Constitution. This doctrine does not deny the right of the judiciary to declare a law unconstitutional, under fitting circumstances; it simply requires the court to respect the only evidence which can properly be before it, — the solemnly authenticated record of the legislature. That body, as it has the power to pass a law, must necessarily have as an incident the right of directing what shall be the supreme evidence of its authenticity. For the judiciary to permit the record to be controlled by journals, which, from the nature of things, are likely to be irregular and inaccurate, does not comport with decency of procedure, and with the respect due to co-ordinate departments of government. *Pangborn v. Young*, 32 N. J. Law, 29.

**CONSTITUTIONAL LAW — JURISDICTION — ADMINISTRATION OF ESTATE OF SUPPOSED DEAD MAN.** — *Held*, that a statute authorizing a probate court to administer the goods of a man who has not been heard of for seven years, as if he were dead, and making that administration good even in case he turns out to be alive, is unconstitutional, as depriving a man of his property without due process of law. *Carr v. Brown*, 38 Atl. Rep. 9 (R. I.). See NOTES.

**CONSTITUTIONAL LAW — RIGHT OF CITIZEN TO USE MAILS.** — *Held*, that a citizen of the United States has a property right in the use of the mails for lawful purposes, of which he cannot be deprived without due process of law. *Hoover v. McChesney*, 81 Fed. Rep. 472. See NOTES.

**CONTRACTS — INSURANCE — PROVISION FOR ARBITRATION.** — *Held*, that a provision in an insurance policy, requiring the settlement out of court of all questions in dispute arising under it, is not invalid as ousting the jurisdiction of the court. *Raymond v. Farmers' Ins. Co.*, 72 N. W. Rep. 254 (Mich.); *Robinson v. Templar Lodge*, 49 Pac. Rep. 170 (Cal.).

It was suggested under the same heading in 11 HARVARD LAW REVIEW, 127, that the hostility of the courts to provisions for arbitration is gradually breaking down. It would be hard to find better illustrations of this than the above cases.

**CRIMINAL LAW — FORMER JEOPARDY.** — The defendant was tried on an indictment for murder in the first degree, and was found guilty of murder in the second degree. *Held*, he could be tried again for the higher offence after the verdict had been set aside on his own motion. *State v. Kessler*, 49 Pac. 293 (Utah).

The weight of authority on this point is *contra*. 1 Bishop, New Criminal Law, 1006. The generally accepted doctrine is that a conviction for an offence less than the highest charged is an acquittal of every higher degree of the offence, and that by moving for a new trial the defendant waives his constitutional defence of former jeopardy only in respect to the issue which has been found against him.

**CRIMINAL LAW — PERJURY — INCRIMINATING TESTIMONY.** — *Held*, that a witness in a pension examination who is manifestly ignorant of his constitutional right to keep silent as to incriminating matters, and who is not informed of it, cannot be convicted of perjury on subjects as to which he might have kept silent. *United States v. Bell*, 81 Fed. Rep. 830.

In *Counselman v. Hitchcock*, 142 U. S. 547, the provision in the Fifth Amendment as to the privilege of a witness was construed very liberally, on the ground that it ex-



presses an ancient and fundamental principle of English and American liberty. That this view is unsound historically, see 1 Jur. Soc. P. 456, and 5 HARVARD LAW REVIEW, 71. In the principal case the provision is construed even more liberally. It seems strained to construe a privilege not to testify as to crimes already committed into a grant of immunity from crimes not yet committed. It may seem a little hard to convict an ignorant man who not knowing his rights swore falsely; but it is submitted that the mitigating circumstances in this case are more properly considered in connection with the sentence to be imposed, or an appeal to the pardoning power, than in deciding on the rule of law.

**DAMAGES — BREACH OF PROMISE OF MARRIAGE — AGGRAVATION.** — In an action for breach of promise of marriage, defendant pleads, as a justification, unchastity in the woman, and fails to prove his plea. *Held*, though the plea was not made in bad faith, the damages might be aggravated on account of it. The plea is on the record, and will remain there as a continued reiteration of the charge against the plaintiff, and therefore a trifling verdict would not show that such charge was unfounded. *Kaufman v. Fye*, 42 S. W. Rep. 25 (Tenn.).

It is true that plaintiff suffers as much injury from such a charge being placed on the record in good faith as if it were done in bad faith. But this is a question of exemplary, not of compensatory damages, and to punish defendant for a *bona fide* plea is to put a penalty upon an honest endeavor to defend a suit. This consideration would seem to require a different result, even if the court is right in saying that the ground for aggravating the damages is that the plea is on record. But it may well be doubted if this is the true ground. It was decided in *Kniffen v. McConnell*, 30 N. Y. 285, that the introduction of this class of evidence under the general issue might be considered in aggravation of damages. That case could not rest upon the reason urged in the principal case, for there was no special plea on the record. Moreover, the result in the principal case is contrary to the reasoning on which exemplary damages are allowed in general, viz. to punish defendant because he has acted maliciously. A plea made in good faith has no tendency to show defendant in such a light. 2 Sedgwick on Damages, 8th ed., § 640.

**DAMAGES — PROSPECTIVE — CONTINUING TRESPASS.** — A railroad built its tracks on a street, under a license from the city. Plaintiff was an abutting owner, but purchased after the building of the road. *Held*, that he was entitled to recover the amount of damages accruing year by year, as for a continuing trespass. *Hoffman v. F. & P. M. R. R. Co.*, 72 N. W. Rep. 167 (Mich.).

This would seem to be a case of a permanent legal structure, for, if necessary in order to prevent removal of the tracks by legal process, the company can take plaintiff's easement by condemnation proceedings. Technically, the trespass is a continuing one, and damages can be recovered to the date of the writ only. *Pond v. Met. Elev. Ry. Co.*, 112 N. Y. 186. But on practical grounds, it would seem better to regard the injury as a permanent one and allow all damages, past and prospective, to be recovered in one action. *Stodghill v. C., B. & Q. R. R. Co.*, 53 Iowa, 341. As a matter of fact, all the damages are suffered at once. There is a permanent depreciation in value which has to be reckoned with in selling the property. That the judgment legalizes that which before was a wrong, is no more than is done by satisfaction of the judgment in the ordinary case of conversion.

**EQUITY — BILL TO GET POSSESSION OF LAND.** — *Held*, that one in whose favor a decision has been rendered in a contest before the United States Land Department, may maintain a bill in equity to obtain possession of part of the land involved, of which he has never been in possession, and which has for a long time been occupied by the other party, though the latter charges that the decision of the Land Office was obtained by fraud. *Barnes v. Newton*, 48 Pac. Rep. 190 (Okl.); dissenting opinion 49 Pac. Rep. 1074. *Woodruff v. Wallace*, 41 Pac. Rep. 357 (Okl.), followed.

The ground of the court for taking jurisdiction is that the remedy at law by action of forcible entry and detainer is slower than the remedy in equity. While this reason may justify the issuance of a preliminary injunction at the suit of one in possession to prevent irreparable injury by a destructive trespass, it is doubtful if it should be applied where, as in the principal case, the plaintiff is out of possession, and no danger of irreparable injury is shown. On the questions of fact involved in an action to get possession of land, it has always been considered that each party has a right to a jury trial, and even where equity has taken jurisdiction it has directed a trial at law under the equity court's control. An assumption of jurisdiction by equity which takes away this right to trial by jury should be made only with the greatest caution, and, as the dissenting judge points out, the authorities cited by the majority hardly justify it in the principal case.

**EVIDENCE — DOCUMENTS — NOTICE TO PRODUCE.** — The defendant was indicted, under a statute, for the misuse of public funds. Checks were traced into his possession. *Held*, that the prosecution might introduce secondary evidence of their contents, without first giving notice to the defendant to produce them. *State v. McCauley*, 49 Pac. Rep. 221 (Wash.).

The reasoning of the court, that notice is not necessary because the defendant cannot be compelled to produce, cannot be supported. Notice is given for the purpose of allowing the opposite party an opportunity to produce, and must be given unless the proceedings are themselves a notice. This was not shown to be the case here. The court cites 3 Rice on Ev., p. 45, for the proposition that notice need not be given "if the evidence in the case shows the document to be in the defendant's possession." The cases supposed to support this exception are all cases where the indictment is for larceny of the paper in question, or for forgery, and are therefore not in point. The opinion is short, and gives the impression that the court does not think that questions of evidence are worthy of investigation.

**EVIDENCE — RIGHT OF STATE TO IMPEACH ITS OWN WITNESSES.** — *Held*, that the State may impeach its own witnesses in criminal cases. *State v. Slack*, 38 Atl. Rep. 311 (Vt.). See NOTES.

**EXECUTIONS — APPLICATION OF PROCEEDS.** — Defendant, a sheriff, collected a sum of money on an execution in favor of plaintiff, and applied part of it on a tax warrant against plaintiff then in his hands for collection. *Held*, that plaintiff could recover the amount so applied. *Eaton v. McElhone*, 49 Pac. Rep. 695 (Kan.).

The reasoning in support of the decision is that money in the hands of a sheriff, collected on an execution, is in the custody of the law, and therefore is not subject to levy or garnishment. The force of this argument was clear when the sheriff was required actually to bring the money into court with the return of the writ. Now, however, the reason of the rule seems to fail, for the officer regularly pays it over at once to the judgment creditor, and could immediately levy on it again. It seems proper to reach the same result without such a useless proceeding, by allowing the sheriff to levy at once on the money while in his own hands. This view has been taken in Vermont, New Hampshire, New Jersey, and Tennessee, though the great weight of authority, beginning with *Turner v. Fendall*, 1 Cranch, 117, is with the principal case. See *Free-man on Executions*, § 130, and note.

**GARNISHMENT — EXECUTORS AS GARNISHEES.** — A was indebted to B, who recovered a judgment against A's executors. C, a creditor of B, attempted to garnish A's executors. The executors filed a disclosure, in which they admitted the judgment, and that the money was in their hands ready to be paid to those entitled to it. No order of distribution had been made by the probate court. *Held*, that the executors could not be garnished. Two judges dissenting. *Hudson v. Wilber*, 72 N. W. Rep. 162 (Mich.).

The authorities are practically unanimous in support of this case. These authorities rest on two grounds, viz., that the executor's liability is not a debt or property within the garnishment statutes, and that the money, being in the hands of an officer of the court, is in the custody of the law, and cannot be reached by an order from another court. The rule is not confined to executors and administrators, but applies to receivers, assignees in bankruptcy, and similar officers of court. In most jurisdictions, garnishment is allowed after final decree of the court appointing such officer, because it is said that the liability of the executor has then become fixed. But the soundness of such a result may be doubted. The court orders the executor to distribute the funds in a certain way, and to allow a different court to change this order would seem to be against public policy. For authorities, see Rood on Garnishment, § 27 *et seq.*

**INSURANCE — CHANGE OF OWNERSHIP — BREACH OF CONDITIONS.** — A policy of fire insurance, with the usual mortgage clause attached, stipulated that the mortgagees should notify the insurer of any change of ownership that came within the mortgagees' knowledge. A change of ownership occurred between the application for insurance by the mortgagees and the delivery of the policy. *Held*, that a failure to notify the insurer did not avoid the policy. *Pioneer Savings & Loan Co. v. Ins. Co.*, 49 Pac. Rep. 231 (Wash.).

The violation of a condition in a policy of insurance either avoids the policy or has no effect whatever. There is no half way ground, and the reasoning of the court that the breach of such a condition sounds in damages simply, is utterly untenable. See May on Ins., 3d ed., § 156 *et seq.* But considering the well recognized temper of courts in construing policies strongly against the insurer, *Western, &c. v. Home Ins. Co.*, 145 Pa. St. 346, the decision may possibly be supported on the ground that the property had changed hands before it was insured; and if the insurance company desired to be



notified of a change of ownership between the application and the issuance of the policy, they should have stipulated for it. *Day v. Ins. Co.*, 72 Iowa, 597. That is, when they issued the policy, they insured the property as it then was; *Dooly v. Ins. Co.*, 16 Wash. 155. Although other reasons are often advanced for such strict construction of policies by modern courts, it is submitted that the only sound ones are, first, the common-law rule applicable to all promises in writing, and, secondly, that the insurance company is an expert in the business.

**MORTGAGES — ACTION OF TORT FOR WRONGFUL SALE UNDER A POWER.** — *Held*, that a mortgagee who wrongfully exercised a power of sale before default is liable to the mortgagor in an action of tort for the full value of the land, although the purchaser from the mortgagee holds subject to the mortgagor's right to redeem. *Rogers v. Barnes*, 47 N. E. Rep. 602 (Mass.). See NOTES.

**PERSONS — ALIENATION OF HUSBAND'S AFFECTIONS.** — *Held*, a married woman can maintain an action against persons who wrongfully entice her husband from her and alienate his affections. *Lockwood v. Lockwood*, 70 N. W. Rep. 784 (Minn.).

The gist of this action is the loss of *consortium*. There seems to be some doubt whether the wife could maintain the action at common law. *Lynch v. Knight*, 9 H. L. Cas. 577. But since by statute the wife is now permitted to sue, for her own benefit, for personal wrongs done her, this action is allowed her in most jurisdictions. See Cooley on Torts, 2d ed., 228. The Maine and Wisconsin courts have, however, denied the wife this remedy. *Doe v. Roe*, 82 Me. 503; *Duffies v. Duffies*, 76 Wis. 374.

**PERSONS — MARRIAGE — FRAUD.** — *Held*, concealment by a woman from her husband at the time of her marriage of the fact that she is pregnant by another man does not render the marriage void. *Moss v. Moss*, [1897] P. 263.

In the course of a well reasoned and technical opinion the court discusses early English text-writers and *dicta* in support of its view, and a number of American authorities opposed to it, of which the leading case is *Reynolds v. Reynolds*, 3 Allen, 605. The decision in the latter case is based upon the ground that pregnancy by another at the time of marriage is in violation of the *essentialia* of marriage, because the wife is incapacitated from bearing her husband children, and he is forced to choose between receiving into his family a child not his, or asserting that his wife is unchaste. The court in the principal case, following the criticism of Bishop on Marriage, §§ 483-499, argues that the disability is temporary only, and that the presumption of legitimacy, although strong, is rebuttable, and if the husband does rebut it he is in no worse plight than if he unwittingly had married merely an unchaste woman, for which it is well settled that he cannot have the marriage declared void. Although Bishop is inclined to justify the result of *Reynolds v. Reynolds*, *supra*, on grounds of public policy, the court logically refuses to follow him, and adheres strictly to the principle that actual consent alone is essential, and that fraud inducing the consent is immaterial. Ayliffe's Parergon, 362.

**PLEADING — ABATEMENT — PENDENCY OF ANOTHER ACTION FOR SAME CAUSE.** — A plea in abatement, alleging that another action for the same cause was pending at the commencement of the suit, but not at the filing of the plea, was *held* properly overruled. *Winner v. Kuehn*, 72 N. W. Rep. 227 (Wis.).

The decision follows *Bates v. Chesebro*, 32 Wis. 594, and overrules a *dictum* in *Le Clerc v. Wood*, 2 Pinney, 37. Some authorities hold that every action commenced during the pendency of another for the same cause is vexatious, and must abate. *Parker v. Colcord*, 2 N. H. 36. The Wisconsin court conceded this to have been the strict common-law rule; but apart from a statement in 1 Bac. Abr. tit. Abatement, M. 65, little direct English authority can be found for such a proposition. Cf. *Green v. Watts*, 1 Ld. Ray. 274. The earlier cases discuss in what actions a plea of *lis pendens* might be filed in abatement of the writ before declaration made, but do not decide the present question. *Sperry's Case*, 5 Co. 61. According to the principles of common-law procedure, it is difficult to see how a plaintiff can succeed in an action in which he was not entitled to recover at the time it was brought; but to compel him to institute another would produce that multiplicity of suits which the defence of *lis pendens* was designed to prevent. It is not surprising, therefore, that the doctrine of the principal case is accepted in most of the United States. *Leavitt v. Mowe*, 54 Md. 613.

**PROPERTY — RIPARIAN RIGHTS — DIVERSION BY GRANTEE.** — An upper riparian proprietor granted to the defendant, a non-riparian owner, a right to lay pipe across his land for the purpose of taking water. This use slightly diminished the supply of water of the plaintiff, a lower proprietor. *Held*, that the use of the water was appurtenant to the riparian land, and, as against the plaintiff, the defendant had no right to



divert the water, and that the court would enjoin him from so doing, without regard to the amount of the plaintiff's injury. *Gould v. Eaton*, 49 Pac. Rep. 577 (Cal.).

The case is exactly like *Ormerod v. Todmorden Mill Co.*, 11 Q. B. D. 155, 172, where Bowen, L. J., approving *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300, says, "The right of the riparian owner may be compared to a right of common appurtenant for cattle levant and couchant upon the land; this right cannot be aliened from the land." See, to the same effect, *Gurwood v. R. R. Co.*, 83 N. Y. 400, where the defendant, although a riparian owner, was enjoined from using the water to supply its locomotives, because it was not used up on the land. The court also implies that there must be some injury to the plaintiff. *Elliot v. Fitchburg R. R. Co.*, 10 Cush 191. But whether an injunction should be granted for a slight injury is questionable, *Earl of Sandwich v. Great Northern R. R. Co.*, 10 Ch. Div. 707, and an action at law would have served as well to prevent the running of the Statute of Limitations.

**PROPERTY — REVOCATION OF LICENSE — BREACH OF CONTRACT.** — Plaintiff and defendant agreed that defendant should let his wall to plaintiff for bill-posting at a certain sum per annum. In an action of contract for withdrawing the permission, it was held that, although the license was revocable, this action was maintainable. *Kerrison v. Smith*, [1897] 2 Q. B. 454.

The decision is undoubtedly sound, and is probably law in this country as well as in England. The argument on the other side is that the plaintiff paid for a revocable license, and that, having received what he bargained for, he should not be heard to complain because the licensor exercised his option to revoke. It is far more probable, however, that the latter contracted not to exercise this option; and this was probably what the court had in mind when it said that the trial judge should not have nonsuited the plaintiff, but should "have gone on with the trial in order to ascertain what the contract really was." The case of *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402, involved the same question, but the point was rather assumed than decided.

**PUBLIC OFFICER — LIABILITY FOR PUBLIC MONEYS.** — Where a city treasurer, pursuant to statutes requiring him to deposit city funds, exercised prudence in the selection of a bank of good standing wherein to deposit the funds, and was free from negligence in permitting them to remain there, *held*, he was not liable for the loss of the funds by the failure of the bank. *City of Livingston v. Woods*, 49 Pac. Rep. 437 (Mont.).

In an action on the official statutory bond of a county treasurer for public moneys collected by him, *held*, that the fact that the moneys were deposited in a solvent banking institution which failed and caused loss, was no defence. *Gartly v. People*, 49 Pac. Rep. 272 (Colo.). *Goddard, J.*, dissenting.

It is interesting to find in the same volume of the reporter another decision on each side of this important question about which there is such conflict. They discuss the four existing theories, and carefully analyze the authorities. The principal cases rest on opposite views of the broad question of a public officer's liability for public moneys. But the second case is weakened by a strongly reasoned dissenting opinion, and the first by the existence of the statute requiring the funds to be deposited, which one of the judges very properly considers sufficient to decide the case. See 10 HARVARD LAW REVIEW, 126, 386, for other late decisions and collection of authorities.

**STATUTE OF LIMITATIONS — ACTION ON ADMINISTRATOR'S BOND.** — A, an administratrix, upon her removal, failed to turn over assets of the estate to B, her successor, as required by statute. She was at the time out of the State, and remained away four years. On her return, B brings an action against A on her bond, joining her sureties. The period of limitation on contracts in writing is five years; on "a liability created by statute," three years. No statute has run in favor of A because of her absence. *Held*, that the action against the sureties is on "a liability created by statute," and is therefore barred. *Davis v. Clark*, 49 Pac. Rep. 665 (Kan.).

A surety's liability is generally measured by the instrument that he signs, *Brandt on Suretyship*, § 93, and the application of the three years Statute of Limitations in the principal case seems strained. The court cites as its authority *Ryus v. Gruble*, 31 Kan. 767, and *Commissioners v. Van Slyck*, 52 Kan. 622. See also *State v. Blake*, 2 Ohio 147, accord. These cases take the ground that an officer's bond is merely collateral security, and that if the action on the principal obligation arising out of his duty as an officer, is barred by any Statute of Limitations, then the security is no longer in force. Assuming that the lapse of the statutory period not only bars the remedy but also extinguishes the right, as some courts have held, these cases may be supported. But they hardly furnish authority for the principal case, where no statute has run in favor of the administratrix, because of her absence from the State.

**TORTS — ACTION FOR DEATH — MEASURE OF DAMAGES.** — Plaintiffs brought action against defendant for negligently causing the death of their thirteen year old son,

*Held*, that the jury are not restricted to an allowance for the value of the son's services during minority, but may take into consideration pecuniary benefits which the parents may reasonably be expected to receive from him after reaching his majority. *Atchison, &c. R. R. Co. v. Cross*, 49 Pac. Rep. 599 (Kan.).

The conflict of authority on this point seems hopeless, and Sedgwick and Sutherland take opposite sides. The weight of decided cases is apparently with Sedgwick and against the above ruling, but the argument from the analogy of cases where recovery is allowed for the death of persons not minors is equally strong the other way. The ground of recovery there, is not a legal right to services or support, but reasonable expectation of pecuniary benefit from the continuance of life, and why not apply the same principle here? See Sedgwick on Damages, 7th ed., 538, foot-note, and Sutherland on Damages, 2d ed., §§ 1273, 1274, and cases cited.

**TORTS — PROXIMATE CAUSE.** — Plaintiff alleged that he was employed provisionally by A until a bond for his good conduct could be secured from B, and that defendant, maliciously and with intent to deprive plaintiff of his employment, made false statements to B, by reason of which B refused to furnish the bond, and plaintiff was in consequence discharged by A. *Held*, on demurrer, that these facts would not entitle plaintiff to recover, as the voluntary act of a third party, B, intervened between defendant's act and plaintiff's damage, especially as it was not shown that B's act was reasonable. *McDonald v. Edwards*, 46 N. Y. Supp. 672.

The court makes the case turn squarely on the question of legal cause, and adopts the doctrine of *Vicars v. Wilcocks*, 8 East, 1, and *Lynch v. Knight*, 9 H. L. Cas. 577; cases which have been severely criticised on this point. It is hard to see why the intervening act of a third party should break the causal connection, when that act was intentionally brought about by the defendant, knowing that it must under the circumstances result in the dismissal of the plaintiff. To say that the act must also have been a reasonable one on B's part is requiring too much. For a full discussion of the question, see 2 Smith L. C., 10th ed., 506, under *Vicars v. Wilcocks*.

**TRADE SECRETS.** — Equity will enjoin a defendant from revealing a secret, though unpatented, process for the manufacture of fly paper where he learned the secret in the confidential employ of the inventor. *Thum Co. v. Tloczynski*, 72 N. W. Rep. (Mich.) 140. See NOTES.

**TRUSTS — POWER OF ATTORNEY — EFFECT AS TRUST DEED.** — B, when near death, delivered to P his savings bank pass book and a power of attorney, by which he appointed P his attorney to draw a certain sum for herself, another sum for funeral expenses, and the balance to be distributed among certain persons. *Held*, that the instrument, though invalid as a power of attorney after B's death, was good as a trust deed of personal property, and vested the title in P, although an implied power of revocation of the trust remained in B, which he might have exercised had he recovered. *Tusch v. German Savings Bank*, 46 N. Y. Supp. 422.

The decision is sound, but the reasoning seems erroneous. It would be contrary to all legal principles and precedents to transform a power of attorney into a deed, and there is no need of attempting it, although the court seems to think a deed necessary to establish a trust and to give the trustee title to the book. A savings bank book is, like a certificate of stock, a chose in action. There was here merely the gratuitous transfer of a chose accompanied with an express power of attorney, which was irrevocable because coupled with an interest, viz. the legal title to the book itself, which passed on delivery and is not merged in the chose in action. But the power of attorney by its terms contained a declaration of trust. P was therefore entitled to the money, but it would be subject to a trust. See *Larrabee v. Hascall*, 88 Me. 511, where, although the power of attorney was implied and the declaration of uses was by parol, a result similar to that of the principal case was reached upon correct reasoning.

**TRUSTS — TERMINATION.** — *Held*, that a statute which assumes to furnish means by which the beneficiary can alienate his interest, and terminate a trust without the consent of the trustee, violates the constitutional provision against depriving one of property without due process of law. *Oviatt v. Hopkins*, 46 N. Y. Supp. 959.

A trustee has admittedly the legal title, but, whether the trust be active or passive, it is held solely for the benefit of the *cestui*, and the beneficial interest is the only one which the law now contemplates and seeks to protect by decision and legislation. Difficulties arise from the powerlessness of a court of equity to bring about a transfer of legal title from one to another, unless it has obtained jurisdiction of the holder of the title. To avoid these, various legislative acts have been passed in England and the United States to protect the *cestui's* interest.

In these acts the trustee's title is declared to be in certain cases vested in the court



of equity, which is then given power by mere decree to vest title in its appointee. Such provisions have been made for insane trustees, *Livingston v. Livingston*, 2 Johns. Ch. 537; infant trustees, *Re Wadsworth*, 2 Barb. Ch. 281; absent trustees, Mass. Pub. Sts. c. 141, § 7; death of trustees, Pub. Laws of N. Y., 1896, c. 547, § 91 a. Such acts are really acts of confiscation by the sovereign and a conveyance from him to the courts. But they have never been questioned constitutionally, because only a legal title and no real interest is confiscated. While no decision so stating has been found, yet it is believed that an examination of the cases will show that the constitutional provision, so generally adopted, applies only to beneficial interests. The act in the principal case is only an elaborate Statute of Uses, which statute might, so far as this decision goes, well be declared unconstitutional.

**WILLS — DESIGNATION OF BENEFICIARY — RESERVATION OF POWER OF APPOINTMENT.** — A testatrix devised all her property to whomsoever should care for her and furnish proper medical treatment, at her request, during the time of her life when she should need it. *Held*, that the devisee was sufficiently designated by the will, though not named, and that there was no reservation of the power of subsequent appointment of the devisee such as would render the will invalid. *Dennis v. Holsapple*, 47 N. E. Rep. 631 (Ind.).

It would seem that no testamentary act remained to be done in the principal case, and that the decision is therefore sound. *Stubbs v. Sargen*, 3 Mylne & Cr. 507. The disposition is complete, though the devisee is to be ascertained by future events. The volition of the testatrix is concerned only so far as making a request goes. While making an appointment would undoubtedly be a testamentary act, making a request, which may or may not be complied with, cannot fairly be so termed. Who will satisfy the description in the will is a matter dependent on an extrinsic contingency, and not on the act of the testatrix. 1 Redfield on Wills, 274.

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## REVIEWS.

**STATE CONTROL OF TRADE AND COMMERCE.** By Albert Stickney. New York : Baker, Voorhis, & Co. 1897. pp. xiv, 202.

This book is an historical analysis, both from the legal and from the economic points of view, of the question of State control of trade and of combinations to control rates. From the economic point of view there is much force in Mr. Stickney's position that combinations of employers to control prices stand on the same footing as combinations of employees to control wages. By an exhaustive review of authority, he shows that ancient legislation recognized this fact by not attempting to control one class without restricting the other also. It is then shown that all such legislation failed; statutes against monopoly and engrossment became dead letters, and were repealed. In view of the modern tendency to excessive legislation, a useful historical argument is here made in favor of allowing the economic machine to work out its problems without being clogged by useless laws.

From the legal point of view, Mr. Stickney proves historically that the common law has no more interfered with the liberty of men and companies to charge what prices they please, than it has restricted the right of laborers to fix their own wages and to combine in order to control wages. Statutes that limited this liberty are shown to have been repealed before the American Revolution, and thus never to have become a part of our common law. The author then considers other statutes that have been passed of late years, leading up to the Trust Act of 1890, which was recently applied in the Trans-Missouri freight case. The author believes that the statute did not apply to that case, and argues that neither common law nor statute, if properly construed, interferes with legitimate



competition either of employer or employee, individually or in combination. As to the interpretation of the statute, the soundness of the position taken may well be doubted; but in regard to the common law the conclusion reached can hardly be questioned.

The book is valuable for the complete collection of authorities. The reasoning is cogent, and the analysis able. It is written in a terse, vigorous style, which makes amends for minor failings in point of form, and is worthy of the attention both of lawyers and of economists.

J. G. P.

**COMMON-LAW PLEADING.** By R. Ross Perry, of the Bar of the District of Columbia. Boston: Little, Brown, & Co. 1897. pp. xxvi, 494.

In the modest preface to this book the author disclaims any pretence to originality, and states his endeavor to have been to give in condensed form the best that has been said on his subject "by many authors in many books." The result is a complete and satisfactory work on the science of common-law pleading. Mr. Perry, however, has done more than he is willing to claim credit for. His comprehensive grasp and understanding of the theory and practice of pleading has contributed at least equally with his selections from other works to the successful result. The method and arrangement of the book are excellent. The historical development of the law is treated with the breath that a proper understanding of the subject requires. The reader is taken from the most primitive remedies involving mere self-help, to complicated actions before courts of law; the functions and jurisdiction of the English courts are explained, and the several forms of actions developed. The steps in an action from the original writ to judgment, are set out fully and clearly. In all this there is much original writing. Mr. Perry has taken bodily, with little modification, Chitty's statement of the principles of the common law with respect to actions, the essential portions of Stephen's commentaries on the rules of pleading, and Dicey's rules governing the selection of the parties to an action; he has also made free use of the third book of Blackstone's Commentaries in the chapter on the English courts. But whenever the matter treated of has been difficult or obscure, Mr. Perry's explanations have simplified it; and when mere general rules have been given, he has enlightened them with specific illustrations. An example of this is the abstract of the pleadings in a supposed case, given on page 227. The advantages to be derived from the study of special pleading are stated by the author in the introduction more forcibly than has perhaps elsewhere been done. The following passage, it would seem, must commend itself to the thoughtful reader: "The study of special pleading is not only essential to a correct understanding of the historical development of the law; it is most admirable and essential as an intellectual training. No man can be a strong reasoner who does not possess natural or acquired logic. No man can be a strong lawyer who has not, in addition to this logic, a clear knowledge of the logic of the law; and special pleading is the logic of the law."

R. L. R.

**HANDBOOK OF THE LAW OF EQUITY PLEADING.** By Benjamin J. Shipman. St. Paul, Minn.: West Publishing Co. 1897. pp. xii, 632.

The subject with which Mr. Shipman deals in this latest volume in the *Hornbook Series* is one that is peculiarly susceptible of useful treatment

in the compendious form which characterizes this series of text-books. Although the main principles in equity pleading are not very abstruse or complicated, yet their application to the facts of particular cases has produced a vast number of subordinate rules of procedure, which are laid down by the courts for the most part only incidentally in their opinions on the merits of all sorts of equity cases, and are therefore not easily ascertained without the aid of some work in which they are collected and systematically arranged. In the construction of this manual, which is designed as a work of reference for practitioners as well as a text-book for students, the author has followed the same plan as in his Handbook of Common-Law Pleading. He deals with the whole subject of chancery procedure in this country in a thorough and orderly manner, taking up in succession the topics of Parties, Proceedings in an Equitable Suit, the form of Bills in Equity, with the particular rules applicable to the different varieties of bills, the Demurrer, the Plea, the Answer, and the Replication. The similarities and contrasts between the systems of pleading at common law and in equity are pointed out, and the application of the rules of Equity Procedure to Code Pleadings is frequently noticed. The historical treatment of the subject, necessarily brief, is remarkably good, and should be useful to students. To the practitioner, the systematic arrangement and full citation of authorities will be points of value.

R. G.

#### A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' BILLS.

By Frederick S. Wait, of the New York Bar. Third Edition. New York: Baker, Voorhis, & Co. 1897. pp. lxxvii, 834.

The purpose and tone of Mr. Wait's work are best indicated in his own vigorous words: "Since the general abolition of imprisonment for contract debts, dishonest people have grown bolder and more reckless, and the power of creditors to enforce payment of just obligations has been correspondingly diminished. . . . The cunning devices and intricate schemes resorted to by debtors to elude the vigilance of creditors would, if no moral turpitude was involved, challenge admiration. . . . It will be our purpose to elucidate the principles of law affecting conveyances made by debtors in fraud of creditors, both in this country and in England, to collate the authorities, and to point out, somewhat at length, the practical methods by which such collusive trusts can be successfully exposed and unravelled, the property regained for the creditors, and the prevalent modern tendency of debtors to hinder, delay, and defraud their creditors by colorable transfers and secret trusts, correspondingly depressed. Bills filed to reach equitable assets, not subject to execution, will necessarily receive incidental consideration." In connection with the principal subjects here mentioned, the author treats fully many practically important questions concerning, for instance, the parties necessary, the forms of procedure, the different sorts of relief, intention, consideration, indicia of fraud, evidence, "spendthrift trusts," preferences, and jurisdictional questions. Mr. Wait's point of view is the right one, his work is thorough, and his style forcible. This new edition contains much valuable new matter, besides additional citations largely increasing its usefulness.

R. G.



COMMENTARIES ON THE LAW OF TRUSTS AND TRUSTEES. By Charles Fisk Beach. 2 vols. St. Louis: Central Law Journal Company. 1897. pp. ccxxxiii, xiii, 1873.

There is no doubt that Mr. Beach's treatise will be welcomed by the profession, especially in America. The last editions of the leading works on this branch of the law appeared several years ago, and in the mean time the courts have rendered many important and interesting decisions. This latest work aims to bring the subject up to date in a thorough and comprehensive manner. In this, it is believed, the author has been successful.

Mr. Beach's Commentaries cover the whole subject of trusts, express and implied, public and private, as administered in the courts of England and the United States. One finds, however, from the table of cases, covering over two hundred pages, that the writer has cited, for the most part, American decisions. It is this fact which will make the work of special value to lawyers in this country. Another leading feature of the Commentaries, distinguishing them, perhaps, from other books upon the same subject, consists in numerous selections from the opinions of the ablest English and American jurists relating to equitable principles as they are now held by the courts. It may well be questioned whether this plan may not be carried to such an extreme as to amount to plain and simple padding. The selections in the present instance, however, are apparently so judicious as not to subject the writer to this criticism.

H. D. H.

CELEBRATED TRIALS. By Henry Lauren Clinton. New York and London: Harper & Bros. 1897. pp. xii, 613.

Lawyers and laymen alike have an interest in a lawyer's account of the marked trials in which he has been concerned; and Mr. Clinton's experience has fitted him for giving such an account. The exciting trial of Mrs. Emma Cunningham for Dr. Burdell's murder, the trial of Richard Crocker for alleged murder in a New York election riot, are subjects calculated to appeal to the popular mind; and in them a professional eye cannot but see much to admire in the clever tactics of Mr. Clinton in dealing with his cases. Yet from an artistic point of view it must be admitted that the book fails. It is virtually a catalogue of Mr. Clinton's acts and addresses, very fully annotated, with occasionally the addition of the address of the opposing counsel and the summing up of the court. Fully annotated indeed,—although the passages which must be looked upon as notes are incorporated in the text, and are made up of masses of indiscriminated details, tedious testimony, and disjointed quotations from the New York Times and other newspapers. The best portion consists in the speeches themselves. They at least have unity. If we pass over questionable taste in exordium and peroration, the addresses are in the main direct and forcible to a degree which enables the reader to feel the lawyer himself, with his firm grasp of facts, and perception sensitive to each fluctuation of the case. They are in keeping with the interest of the subjects in hand, and in spite of their setting are worth reading.

J. G. P.



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## THE HISTORY OF TROVER.

THE classic count in trover alleges that the plaintiff was possessed, as of his own property, of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff's damage. And yet throughout the history of this action the last of these five allegations has been the only one that the plaintiff must prove. The averments of loss and finding are notorious fictions, and that of demand and refusal is surplusage, being covered by the averment of conversion. Under the first allegation the plaintiff need not prove that the chattel was his own property, or that he was in actual possession of it. It is enough to show actual possession as a bailee, finder, or trespasser, or to prove merely an immediate right of possession.

A greater discrepancy than that here pointed out between a count and the evidence required to support it can hardly be found in any other action. But it is generally true that averments in pleading, however inaccurate, superfluous, or fictitious they may be at a given time, were once accurate and full of legal significance. The count in trover is no exception to this rule. To make this clear, however, it is necessary to consider in some detail the remedies at the command of the plaintiff, in early Eng-

lish law, for the asportation, detention, or destruction of chattels. These remedies were the four actions, known as Appeals of robbery or larceny, Trespass, Replevin, and Detinue.

#### APPEAL OF ROBBERY OR LARCENY.

For a century after the Norman Conquest there was no public prosecution of crime. Proceedings against wrong-doers, whether criminals or mere tort-feasors, depended upon the initiative of the parties injured, and took the form of private actions. These actions, in the royal courts, were called appeals, and, in their final development, fell into three classes: (1) the compensatory appeals, *i. e.*, appeals of battery, mayhem, and imprisonment, in which the appellor recovered damages; (2) the punitive appeals, *i. e.*, appeals of homicide, rape, arson, and also robbery or larceny of chattels worth 12*d.* or more, where the stolen chattels could not be recovered, in which the punishment of the defendant was the sole object;<sup>1</sup> (3) the recuperatory appeals of robbery or larceny, in which the appellor sought to recover the stolen chattels as well as to discover and punish the thief. It is with this class of appeals that we are concerned in this paper.

The procedure in the Anglo-Norman period is described by Glanvil, Bracton, Britton, and Fleta.<sup>2</sup> Britton's account is the fullest. The victim of the theft upon the discovery of his loss raised hue and cry, and with his neighbors made fresh pursuit after the thief. If the latter was caught, on fresh pursuit, with the "mainour," *i. e.*, with the pursuer's goods in his possession, the case was disposed of in the most summary manner. The prisoner was taken at once to an impromptu court, and if the pursuer, with others, made oath that the goods had been stolen from him, was straightway put to death, without a hearing, and the pursuer recovered his goods. Britton's statement is borne out by several reported cases.<sup>3</sup>

<sup>1</sup> "This appeal is not a real or personal action . . . the woman (appellor) is seeking vengeance for the death of her husband." Y. B. 9 Hen. IV. f. 2, pl. 8. The compensatory appeals, in their origin, were likewise actions for vengeance. 1 Nich. Britt. 124; Fleta, Lib. I. cap. 40, 42; Y. B. 18 Ed. III. f. 20, pl. 31; 2 Pollock & Maitland, Hist. Eng. Law, 487.

<sup>2</sup> Glanvil, Bk. 10, ch. 15-17; Bract. 150 b-152; 1 Nich. Britt. 55-60; Fleta, Lib. I. ch. 38; see also Mirror of Justices, Seld. Soc'y, Bk. III. c. 13.

<sup>3</sup> Northumberland Assize Rolls, 79 (40 Hen. III.). "Stephanus de S . . . captus fuit cum quodam equo furato per sectam Willelmi T. et decollatus fuit, praesente bal-

If not taken freshly on the fact, the person found in possession of the chattel had a right to be heard. The appellor, placing his hand upon the chattel,<sup>1</sup> charged the appellee with the theft. There were several modes of meeting the charge. The appellee might deny it *in toto*. The controversy was then settled by wager of battle, unless the appellee preferred a trial by jury.<sup>2</sup> The chattel went to the winner in the duel.

The appellee might, on the other hand, claim merely as the vendee or bailee of a third person. He would then vouch this third person as a warrantor to appear and defend the appeal in his stead. Glanvil gives the writ to compel the appearance of the warrantor.<sup>3</sup> If the warrantor failed to appear, or, appearing, successfully disputed the sale or bailment by wager of battle,<sup>4</sup> the appellor recovered the chattel, and the appellee was hanged. If the appellee won in the duel with the vouchee, the vouchee was hanged.<sup>5</sup> If the warrantor came and acknowledged the sale or bailment, the chattel was put temporarily in his hands, the appellee withdrew from the appeal, and the appellor thereupon appealed the warrantor as the thief, or with the words that he knew no other thief than him.<sup>6</sup> The warrantor might in his turn vouch to warranty or dispute the appellor's right. If the appellor was finally successful against any warrantor, he recovered the chattel. If he was unsuccessful, the chattel was restored to the original appellee. This vouching to warranty is to be regarded as the following up of the trail of the thief, whose capture is an essential object of the whole procedure.

*livo domini Regis, et praedictus equus deliberatus fuit praedicto W. qui sequebatur pro equo illo in pleno comitatu.*" In 1271 one Margaret appealed Thomas and Ralph for killing her brothers. But she was imprisoned for her false appeal, since Thomas and Ralph, who had pursued and beheaded her brothers as thieves taken with the "mainour," had acted according to the law and custom of the realm. Pl. Ab. 184, col. 1, rot. 24. This custom was condemned by the justices, in 1302, who said that one who had beheaded a manifest thief should be hanged himself. Y. B. 30 & 31 Ed. I. 545. See 2 Pollock & Maitland, Hist. Eng. Law, 495.

<sup>1</sup> Bract. Note Book, No. 824.

<sup>2</sup> As early as 1319 the rule was established that a thief taken with the "mainour" could not defend an appeal by wager of battle, but must put himself upon the jury; "for the appeal has two objects, to convict the thief and to recover the stolen chattel, and the law recognizes that the thief, though guilty, might by bodily strength vanquish the appellor and thus keep the chattel without reason." Fitz. Cor. 375. See also Fitz. Cor. 157, 125, 100, 268.

<sup>3</sup> Book X. ch. 16.

<sup>4</sup> Sel. Pl. of Crown, 1 Seld. Soc'y, No. 124.

<sup>5</sup> Bract. Note Book, No. 1435.

<sup>6</sup> Sel. Pl. of Crown, 1 Seld. Soc'y, No. 192; Bract. Note Book, No. 67.



The appellee might, thirdly, though having no one to vouch as a warrantor, claim to have bought the chattel at a fair or market. Upon proof of this he was acquitted of the theft; but the appellor, upon proof of his former possession and loss of the chattel, recovered it. There was, as yet, no doctrine of purchase in market overt.

This private proceeding for the capture of the thief and recovery of the stolen chattel, as described in English law treatises and decisions of the thirteenth century, is of Teutonic origin. Its essential features are found in the Salic law of the fifth century;<sup>1</sup> but by the middle of the thirteenth century this time-honored procedure had seen its best days. The public prosecution of crime was introduced by the Assize of Clarendon in 1166, and with the increasing effectiveness of the remedy by indictment, the victims of robbery or theft were more and more willing to leave the punishment of wrong-doers in the hands of the Crown. On the other hand, the path of him who would use the appeal as a means of recovering the chattel stolen from him was beset with difficulties.

The appellor must, in the first place, have made fresh pursuit after the thief. In 1334 it was said by counsel that if he whose goods were stolen came within the year and a day, he should be received to have back his chattels. But Aldeburgh, J., answered: "Sir, it is not so in your case, but your statement is true in regard to waif and estray."<sup>2</sup>

Secondly, the thief must have been captured by the appellor himself or one of his company of pursuers. In one case the owner of the stolen chattel pursued the thief as far as a monastery, where the thief took refuge in the church and abjured the realm. Afterward the coroner delivered the chattel to the owner because he had followed up and tried to take the thief. For having foolishly delivered the chattel the coroner was brought to judgment before the justices in eyre.<sup>3</sup> So if the thief was arrested on suspicion

<sup>1</sup> Sohm, *Der Process d. Lex. Salica*; Jobbé-Duval, *La Revendication des Meubles*; Brunner, *Rechtsgeschichte*, I. 495 *et seq.*; Schroeder, *Lehrbuch d. deutschen Rechtsgeschichte*, 346 *et seq.*

<sup>2</sup> Y. B. 8 Ed. III. f. 10, pl. 30. See also Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 7 Hen. IV. f. 31, pl. 16; Y. B. 7 Hen. IV. f. 43, pl. 9; Roper's Case, 2 Leon. 108. In a case cited in Sel. Pl. Ct. Adm. 6 Seld. Soc'y, XL., restitution was ordered in the Admiralty Court "because by the law maritime the ownership of goods taken by pirates is not divested unless the goods remain in the pirates' possession for a night." See also Y. B. 7 Ed. IV. f. 14, pl. 5; and compare Y. B. 22 Ed. III. f. 16, pl. 63.

<sup>3</sup> Y. B. 30 & 31 Ed. I. 527.

by a bailiff, the king got the stolen chattel, because the thief was not arrested by the party.<sup>1</sup>

Thirdly, the thief must be taken with the goods in his possession. If, for instance, the goods were waived by the thief and seized by the lord of the franchise before the pursuers came up, the lord was entitled to them.<sup>2</sup>

Fourthly, the thief must be convicted on the pursuer's appeal. "It is coroner's law that he, whose goods were taken, shall not have them back unless the felon be attainted at his suit."<sup>3</sup> In one case the verdict in the case was not guilty, and that the appellee found the goods in the highway. The goods were present in court. It was asked if the goods belonged to the appellor, and found that they did. Nevertheless, they were forfeited to the king.<sup>4</sup> In another case the thief was appealed by three persons for different thefts. He was convicted upon the first appeal and hanged. The goods of the two other appellors were forfeited to the king.<sup>5</sup> The result was the same if the pursuer's failure to convict was because the thief rather than be taken killed himself,<sup>6</sup> or took refuge in a church and abjured the realm,<sup>7</sup> or died in prison.<sup>8</sup>

Finally, since the rule which denied the right of defence by wager of battle to one taken with the "mainour" seems not to have been established before the fourteenth century,<sup>9</sup> the appellor was exposed to the risk of defeat and consequent loss of his chattels by reason of the greater physical skill and endurance of the appellee. There was the danger, also, that an appellee of inferior physical ability might fraudulently vouch as a warrantor an expert

<sup>1</sup> Fitz. Cor. 379 (12 Ed. II.). See also Y. B. 30 & 31 Ed. I. 509; Y. B. 30 & 31 Ed. I. 513; Fitz. Cor. 392 (8 Ed. II.); Fitz. Cor. 190, criticising Y. B. 26 Lib. Ass. 17.

<sup>2</sup> Dickson's Case, Hetley, 64. But see Rook and Denny, 2 Leon. 192.

<sup>3</sup> Y. B. 8 Ed. III. f. 10, pl. 30; Fitz. Avow. 151, per Schardelow, J.

<sup>4</sup> Fitz. Cor. 367 (3 Ed. III.).

<sup>5</sup> Y. B. 44 Ed. III. f. 44, pl. 57; Fitz. Cor. 95. But see Y. B. 7 Hen. IV. f. 31, pl. 16, Fitz. Cor. 21; and compare Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26.

<sup>6</sup> Fitz. Cor. 318 (3 Ed. III.).

<sup>7</sup> Y. B. 30 Ed. I. 527; Fitz. Cor. 162 (3 Ed. III.). But see Fitz. Cor. 380 (12 Ed. II.) *semble*, and Y. B. 26 Lib. Ass. 32, Fitz. Cor. 194 (*semble*), *contra*.

<sup>8</sup> Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26. But see *contra*, Fitz. Cor. 379 (12 Ed. II.) and Fitz. Forf. 15 (44 Ed. III.). In the last half of the fourteenth century this rule was so far relaxed that the pursuer might recover his chattels if the conviction of the thief was prevented by his standing mute. Y. B. 26 Lib. Ass. 17; Y. B. 44 Lib. Ass. 30; Y. B. 8 Hen. IV. f. 1, pl. 2, Fitz. Cor. 71; or claiming benefit of clergy: Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 10 Hen. IV. f. 5, pl. 18, Fitz. Cor. 466; Y. B. 2 R. III. f. 12, pl. 31; Y. B. 3 Hen. VII. f. 12, pl. 10.

<sup>9</sup> *Supra*, n. 2, p. 279.

fighter, who, as a paid champion, would take the place of the original appellee. To avoid the duel with this champion, the appellor must establish by his *secta* or by an inquest that the ostensible warrantor was a hired champion.<sup>1</sup>

It is obvious from this account of the appeal of robbery or larceny that the absence of pecuniary redress against a thief must sooner or later become an intolerable injustice to those whose goods had been stolen, and that a remedy would be found for this injustice. This remedy was found in the form of an action for damages, the familiar action of

#### TRESPASS DE BONIS ASPORTATIS.

The recorded instances of trespass in the royal courts prior to 1252 are very few. In the "Abbreviatio Placitorum" some twenty-five cases of appeals of different kinds are mentioned, belonging to the period 1194-1252, but not a single case of trespass. In the year 37 Henry III. (1252-1253) no fewer than twenty-five cases of trespass are recorded, and from this time on the action is frequent, while appeals are rarely brought. It is reasonable to suppose that the writ of trespass was at first granted as a special favor, and became, soon after the middle of the fourteenth century, a writ of course.

The introduction of this action was a very simple matter. An original writ issued out of Chancery directing the sheriff to attach the defendant to appear in the King's Bench to answer the plaintiff. The jurisdiction of the King's Court was based upon the commission of an act *vi et armis* and *contra pacem regis*, for which the unsuccessful defendant had to pay a fine. These words were therefore invariably inserted in the declaration. Indeed, the count in trespass was identical with the corresponding appeal, except that it omitted the offer of battle, concluded with an *ad damnum* clause, and substituted the words *vi et armis* for the words of felony, — *feloniter, felonice, in feloniam, or in robberiam*. The count in the appeal was doubtless borrowed from the ancient count in the popular or communal courts, the words of felony and *contra pacem regis* being added to bring the case within the jurisdiction of the royal courts.<sup>2</sup>

<sup>1</sup> The appellor succeeded in doing so in the case reported in Sel. Pl. Cor., 1 Seld. Soc'y, No. 192, and the champion with special leniency was condemned to the loss of one of his feet, instead of losing both foot and fist.

<sup>2</sup> As there was no appeal for a trespass upon land, Sel. Pl. Cor. (Seld. Soc'y), No. 35, the action of trespass *quare clausum fregit* was brought into the royal courts directly from the popular courts.



The procedure of the King's Courts was much more expeditious than in the popular courts, the trial was by jury<sup>1</sup> instead of by wager of law, and judgment was satisfied by levy of execution and sale of the defendant's property, whereas in the popular courts distress and outlawry were the limits of the plaintiff's rights. As an appeal might be brought for the theft of any chattel worth 12*d.* or more, and as the owner now had an option to bring trespass where an appeal would lie, there was danger that the royal courts would be encumbered with a mass of petty litigation. To meet this threatened evil the Statute 6 Ed. I. c. 8 was passed, providing that no one should have writs of trespass before justices unless he swore by his faith that the goods taken away were worth 40 shillings at the least.

The plaintiff's right in trespass being the same as the appellor's right in the appeal, we may consider them together. Bracton says the appeal is allowed "*utrum res quae ita subtracta fuerit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua.*"<sup>2</sup> Britton and Fleta are to the same effect.<sup>3</sup> The right is defined with more precision in the "*Mirror of Justices*": "In these actions (appeals) two rights may be concerned, — the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance, where the thing had been lent, bailed, or let); and the right of property, as is the case where a thing is stolen or robbed from the possession of one to whom the property in it belongs."<sup>4</sup> The gist of the plaintiff's right was, therefore, possession, either as owner or as bailee.<sup>5</sup> On the death of an owner in possession of a charter the heir was constructively in possession, and could maintain trespass against one who anticipated him in taking physical possession of the charter.<sup>6</sup>

The bailor could not maintain an appeal, nor could he maintain the analogous *Anefangsklage* of the earlier Teutonic law.<sup>7</sup> He had given up the possession to the bailee, retaining only a *chose in*

<sup>1</sup> In one case the defendant offered wager of battle and the plaintiff agreed, but the court would not allow it. Y. B. 32 & 33 Ed. I. 319.

<sup>2</sup> Bract. 151. To the same effect, Bract. 103 b, 146 a.

<sup>3</sup> 1 Nich. Britt. 56; Fleta, Lib. 1, c. 39.

<sup>4</sup> Book II. c. 16 (Seld. Soc'y).

<sup>5</sup> For instances of appeals by bailees see Sel. Pleas of the Crown, Nos. 88 and 126, and for a recognition of the bailee's right in later times Fitz. Cor. 100 (45 Ed. III.); Y. B. 2 Ed. IV. f. 15, pl. 7; Keilw. 70, pl. 7.

<sup>6</sup> Y. B. 16 Ed. II. 490; Y. B. 1 Ed. III. f. 22, pl. 11. The owner could not have the action against a second trespasser, for the possession of the first trespasser, being adverse to owner, could not be regarded as constructively the owner's.

<sup>7</sup> 1 Brunner, Deutsche Rechtsgeschichte, 509.

action. For the same reason the bailor was not allowed, for many years, to recover damages in trespass. As early as 1323, however, and, doubtless, by the fiction that the possession of a bailee at will was the possession of the bailor also, the latter gained the right to bring trespass.<sup>1</sup> In 1375 Cavendish, J., said, "He who has property may have trespass, and he who has custody another writ of trespass." And Persay answered: "It is true, but he who recovers first shall oust the other of his action."<sup>2</sup> And this has been the law ever since where the bailment was at the will of the bailor. The innovation was not extended to the case of the pledgor,<sup>3</sup> or bailor for a term.<sup>4</sup>

This same distinction between a bailment at will and a bailment for a time is pointedly illustrated by the form of indictment for stealing goods from the bailee: "If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume possession when he thinks fit, the goods may be described either as his goods, or his bailee's. . . . The ground of the decision in *Rex v. Belstead* and *Rex v. Brunswick* was that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass."<sup>5</sup>

In like manner, it is probable that for an estray carried off trespass might have been brought by either the owner or the lord within the year and a day.<sup>6</sup> A servant could not bring trespass unless he had been intrusted with goods as a bailee by or for his master.<sup>7</sup> Nor could a servant maintain an appeal without his master.<sup>8</sup>

<sup>1</sup> Y. B. 16 Ed. II. 490; Y. B. 5 Ed. III. f. 2, pl. 5.

<sup>2</sup> Y. B. 48 Ed. III. f. 20, pl. 16.

<sup>3</sup> Y. B. 10 Hen. VI. f. 25, pl. 16.

<sup>4</sup> *Ward v. Macaulay*, 4 T. R. 489.

<sup>5</sup> Per Bayley, B., as cited in 2 Russ. Crimes (5th ed.), 245. The same distinction is made in 1 Hale P. C. 513.

<sup>6</sup> Y. B. 20 Hen. VII. f. 1, pl. 1. But in this same case the right of a distrainor to have trespass was denied.

<sup>7</sup> Y. B. 2 Edw. IV. f. 15, pl. 7, per Littleton; *Heydon's Case*, 13 Rep. 69; *Bloss v. Holman*, Ow. 52, per Anderson, C. J.; *Goulds*, 66, pl. 10, 72, pl. 18, s. c.

<sup>8</sup> The master could bring an appeal against a thief and offer to prove by the body of his servant who saw the theft, and the servant would accordingly charge the appellee of the same theft, and offer to prove by his body. 1 Rot. Cur. Reg. 51; 3 Bract. Note Book, No. 1664. See also Y. B. 30 & 31 Ed. I. 542; *Fitz. Replev.* 32 (19 Ed. III.).

Trespass was an action for damages only,<sup>1</sup> *i. e.* a strictly personal action. But being a substitute for the appeal, which gave the successful appellor the stolen *res*, the measure of damages would naturally be the value of the stolen *res*. This was the rule of damages even though the action was brought by a bailee<sup>2</sup> or by a trespasser against a second trespasser. The rule was at one time thought to be so inflexible as to deprive a bailee for a time of the right to bring trespass for a wrongful dispossession by his bailor. Hankford, J., said in one case: "Plaintiff shall not have the action, because then he would recover damages to the value of the beasts from him who owned them, and this is not right. But the plaintiff shall have an action on the case. But if a stranger takes beasts in my custody I shall have trespass against him and recover their value, because I am chargeable to my bailor who has the property, but here the case is different *quod* Hill and Culpepper, JJ., *concesserunt*."<sup>3</sup> It is needless to say that this is no longer law. The plaintiff has for centuries been allowed to recover in trespass against the bailor his actual loss.<sup>4</sup> On the same principle it was once ruled that a plaintiff could not have trespass if his goods had been returned to him; "for, as Fulthorp, J., said, the plaintiff ought not to have his goods and recover value too, therefore he should recover damages in trespass on the case for the detainer."<sup>5</sup> But Paston, J., said the jurors should allow for the return of the chattel in assessing the damages, and his view has, of course, prevailed.<sup>6</sup>

The close kinship between the appeal and trespass explains the nature of the trespasser's wrong to the plaintiff. A robber or thief dispossesses the owner with the design of excluding him from all enjoyment of the chattel. His act is essentially the same as that of one who ejects another from his land, *i. e.*, a disseisin. Indeed, in many respects the recuperatory appeal of robbery or larceny is the analogue of the assize of novel disseisin. It is not surprising, therefore, to find that trespass for an asportation would not lie

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<sup>1</sup> Pl. Ab. 336, col. 2, rot. 69 (14 Ed. II.); *ibid.* 346, col. 2, rot. 60 (17 Ed. II.); Y. B. 1 Hen. IV. f. 4, pl. 5.

<sup>2</sup> Y. B. 11 Hen. IV. f. 23, pl. 46; Y. B. 8 Ed. IV. f. 6, pl. 5; Heydon's Case, 13 Rep. 67, 69; *Swire v. Leach*, 18 C. B. N. s. 479. There are numerous cases in this country to the same effect. See, however, *Claridge v. South Staffordshire Co.*, '92, 1 Q. B. 422.

<sup>3</sup> Y. B. 11 Hen. IV. f. 23, pl. 46.

<sup>4</sup> Heydon's Case, 13 Rep. 67, 69; *Brierly v. Kendall*, 17 Q. B. 937.

<sup>5</sup> Y. B. 21 Hen. VI. f. 15, pl. 29.

<sup>6</sup> Br. Ab. Tresp. 221, 130; *Chinnery v. Vial*, 5 H. & N. 288, 295. See also Y. B. 21 & 22 Ed. I. 589.



originally except for such a dispossession as in the case of land would amount to a disseisin.<sup>1</sup> If, for instance, a chattel was taken as a distress, trespass could not be maintained.<sup>2</sup> Replevin was the sole remedy. In 1447 the Commons prayed for the right to have trespass in case of distress where the goods could not be come at.<sup>3</sup>

In one respect trespass differed materially from the appeal and also from the assize of novel disseisin. The disseisee and the owner of the chattel could recover the land or the chattel from the grantee of the disseisor or thief. But the dispossessed owner of a chattel could not bring trespass for the value of the chattel against the grantee of the trespasser.<sup>4</sup> Even here, however, the analogy did not really fail. Trespass was an action to recover damages for a wrong done to the plaintiff by taking the chattel from his possession. The grantee of the trespasser had done no such wrong. Therefore, no damages were recoverable, and the action failed altogether. Similarly the grantee of the disseisor had done no wrong to the disseisee, and therefore, while he must surrender the land, he was not obliged, prior to the Statute of Gloucester, to pay damages to the demandant.<sup>5</sup> On the contrary, the demandant was in *miseri-cordia* if he charged the grantee with disseisin.<sup>6</sup> By the same reasoning, just as the dispossessed owner of a chattel could not have trespass against a second trespasser,<sup>7</sup> so the demandant could not recover damages from a second disseisor.<sup>8</sup> The wrong in each case was against the first trespasser or disseisor, who had gained the fee simple or property, although a tortious fee simple or property.

<sup>1</sup> Trespass for the destruction of a chattel has been allowed from very early times. Y. B. 1 Ed. II. 41; Y. B. 11 Ed. II. 344; Y. B. 2 Ed. III. f. 2, pl. 5; *Watson v. Smith*, Cro. El. 723. There is in the *Registrum Brevium* no writ of trespass for a mere injury to a chattel, not amounting to its destruction. Presumably it was thought best that plaintiffs should seek redress for such minor injuries in the popular courts. There is an instance of such an action in 1247 in a manorial court of the Abbey of Bec. Sel. Pl. Man. Ct. (Seld. Soc'y) 10. In later times the remedy in the King's Bench was by an action on the case. *Slater v. Swan*, 2 Stra. 872. See also *Marlow v. Weekes*, Barnes' Notes, 452. Finally, trespass was allowed without question raised. *Dand v. Sexton*, 3 T. R. 37.

<sup>2</sup> Pl. Ab. 265, col. 2, rot. 8 (32 Ed. I.).

<sup>3</sup> 5 Rot. Parl. 139 b. (399 a seems to be the same petition.)

<sup>4</sup> Y. B. 21 Ed. IV. f. 74, pl. 6; *Day v. Austin*, Ow. 70; *Wilson v. Barker*, 4 B. & Ad. 614.

<sup>5</sup> Bract. 164, 172, 175 b; 2 Bract. Note Book, No. 617; Y. B. 37 Hen. VI. f. 35, pl. 22; Y. B. 13 Hen. VII. f. 15, pl. 11; *Symons v. Symons*, Hetl. 66.

<sup>6</sup> 2 Bract. Note Book, Nos. 617 and 1191.

<sup>7</sup> Y. B. 21 Ed. IV. f. 74, pl. 6. See the HARVARD LAW REVIEW, Vol. III. p. 29.

<sup>8</sup> Br. 172.

The view here suggested, that the defendant's act in trespass *de bonis asportatis* was essentially the same as that of a disseisor in the case of land, has put the writer upon the track of what he believes to be the origin of the familiar distinction in the law of trespass *ab initio* between the abuse of an authority given by law, and the abuse of an authority given by the party, the abuse making one a trespasser *ab initio* in the one case but not in the other. As we have seen, replevin, and not trespass, was the proper action for a wrongful distress. If, however, when the sheriff came to replevy the goods, the landlord, claiming the goods as his own, refused to give them up, the replevin suit could not go on; the plaintiff must proceed either by appeal of felony, or by trespass.<sup>1</sup> The defendant by this assumption of dominion over the goods and repudiation of the plaintiff's right was guilty of a larceny and trespass. Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion, without proof, of ownership. The plaintiff as before was driven to his appeal or trespass.<sup>2</sup>

Early in the reign of Edward III. the law was so far changed that the defendant's claim of ownership would not defeat the replevin action unless made before deliverance of the goods to the sheriff.<sup>3</sup> But the old rule continued, if the distrainer claimed ownership before the sheriff, until, by the new writ, *de proprietate probanda*, the plaintiff procured a deliverance in spite of the defendant's claim, and thus was enabled to continue the replevin action as in the case of a voluntary deliverance. But the resort to this writ was optional with the plaintiff. He might still, if he preferred, treat the recusant defendant as a trespasser. In Rolle's Abridgment we read: "If he who has distrained detains the beasts

<sup>1</sup> "If the taker or detainer admit the bailiff to view, and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not a villein of the deforcer, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony if he thinks fit to do so." 1 Nich. Britt. 138. In Y. B. 21 & 22 Ed. I. 106, counsel being asked why the distrainer did not avow ownership when the sheriff came, answered: "If we had avowed ownership he would have sued an appeal against us."

<sup>2</sup> Y. B. 32 & 33 Ed. I. 54.

<sup>3</sup> The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. Y. B. 5 Ed. III. f. 3, pl. 11; see the HARVARD LAW REVIEW, Vol. III. 32.

after amends tendered before impounding, he is a trespasser *ab initio*. 45 Ed. III. 9 b. *Contra*, Co. 8, Six carpenters, 147."<sup>1</sup>

What was true in the case of a distress was equally true of an estray. "If the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirree*) in form of trespass, or an appeal of larceny, by words of felony."<sup>2</sup> In 1454 Prisot, J., in answer to counsel's suggestion that, if he lost a box of charters, he should have detainue, said: "I think not, for in your case you shall notify the finder and demand their surrender, and if he refuses, you shall have an action of trespass against him; for by the finding he did no wrong, but the tort began with the detention after notice."<sup>3</sup>

On the other hand, a bailee who, in repudiation of his bailor's rights, refused to give back the chattel on request was never chargeable as a thief or trespasser.<sup>4</sup> Unlike the distrainor or finder, who took the chattel without the consent of the owner but by virtue of a rule of law, the bailee did not acquire the possession by a taking, but by the permission and delivery of the bailor. Hence it was natural to say that a subsequent tort made one a trespasser *ab initio* if he came to the possession of a chattel by act of law, but not if he came to its possession by act of the party. The rule once established in regard to chattels was then extended to trespasses upon realty and to the person.

The subsequent history of the doctrine of trespass *ab initio* is certainly curious. There seems to be no indication in the old books that anything but a refusal to give up the chattel would make the distrainor or finder a trespasser. But in the case, in which Prisot, C. J., gave the opinion already quoted, Littleton, of counsel, insisted that detainue and not trespass was the proper action against the distrainor or finder for refusal to give up the chattel on demand, but admitted that trespass would lie if they killed or used the chattel.<sup>5</sup>

<sup>1</sup> 2 Roll. Ab. 561 [G], 7. The Year Book supports Rolle.

<sup>2</sup> 1 Nich. Britt. 68. See *ibid.* 215: "No person can detain from another birds or beasts, *ferae naturae*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays."

<sup>3</sup> Y. B. 33 Hen. VI. f. 26, pl. 12.

<sup>4</sup> Y. B. 16 Hen. VII. f. 2, pl. 7; 1 Ames & Smith, Cases on Torts, 252, 253, n. 1.

<sup>5</sup> "If I refuse to give up the distress, still he shall not have trespass against me, but detainue, because it was lawful at the beginning when I took the distress; but if I kill them or work them for my own account, he shall have trespass. So here, when he found the charters it was lawful, and although he did not give them up on request, he



Littleton's view did not at once prevail.<sup>1</sup> But it received the sanction of Coke, who said that a denial, being only a non-feasance, could not make one a trespasser *ab initio* ;<sup>2</sup> and their opinion has ever since been the established law. A singular departure this of Littleton and Coke from the ancient ways — the doctrine of trespass *ab initio* inapplicable to the very cases in which it had its origin !

J. B. Ames.

[To be continued.]

shall not have trespass, but detain against me, for no trespass is done yet ; no more than where one delivers goods to me to keep and redeliver to him, and I detain them, he shall never have trespass, but detain against me *causa qua supra*." Y. B. 33 Hen. VI. f. 26, pl. 12.

<sup>1</sup> See Littleton's own statement when judge in Y. B. 13 Ed. IV. f. 6, pl. 2. According to Y. B. 2 Rich. III. f. 15, pl. 39 : " It was said by some that if one loses his goods and another finds them, the loser may have a writ of trespass if he will, or a writ of detain." In *East v. Newman* (1595), Golds. 152, pl. 79, a finder who refused to give up the goods to the owner was held guilty of a conversion, Fenner, J., saying : " For when I lose my goods, and they come to your hands by finding, and you deny to deliver them to me, I shall have an action of trespass against you, as 33 Hen. VI. is."

<sup>2</sup> *Isaac v. Clark*, 1 Roll. R. 126.

THE JUDICIAL USE OF TORTURE.<sup>1</sup>

## PART II.

## THE TREATMENT OF CRIMINALS IN ENGLAND.

THE illegality of torture in England has been a subject of boasting among Englishmen for more than five centuries, and it has been commonly attributed either to a famous clause in Magna Charta, or to a peculiar degree of humanity in the race. That the barons at Runnymede ever thought of the subject at all is highly improbable, because torture scarcely existed at the time in any part of Europe; and if they had intended to forbid the practice, they would undoubtedly have done so with the specific language that they used in describing other grievances. The Great Charter has come to be popularly regarded as a kind of prophetic document, which included in its protection all the rights of Englishmen, whether known in the reign of King John or not; but the suggestion that it was intended to forbid the use of torture, or directly prevented its introduction, will hardly bear the test of historical investigation. Nor, in view of the barbarous methods of execution in England, can the absence of torture be ascribed to any peculiarly humane feeling. No one can read the sentence of a man for treason in the last century, with its description of the process of hanging, drawing, and quartering, or remember that the punishment of a woman for the same offence was burning alive, without recognizing that there was no great tenderness for criminals. Moreover, the English had no hesitation in resorting to torture where the exigencies of criminal procedure called for it. It was a principle of law, a curious survival of archaic forms, that a person accused of crime could not be tried by a jury without his own consent; that is, he must voluntarily accept the trial, or put himself on the country, by pleading guilty or not guilty. If he refused to do so, and it was found that he did not stand mute by the judgment of God, he was, in cases of treason or misdemeanor, immediately convicted; but in cases of felony, where this was not allowed, the prosecution was blocked at the outset. It is obvious

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<sup>1</sup> Continued from page 233.

that a criminal could not be suffered to cheat justice by his silence ; and hence he was subjected to the *peine forte et dure*, which meant that he was laid on his back under heavy weights, and fed with bad bread and stagnant water, until he pleaded or died. During the trials for witchcraft in Salem Giles Corey was killed in this way ; his object in not submitting to trial being a heroic determination to preserve for his daughters his property, which would have been forfeited to the Crown by a conviction for the crime. It would seem, therefore, to be more likely that the humanity of the English people was promoted by the absence of torture, than that the absence of torture was due to any innate abhorrence of inflicting pain.

The real cause of the human method of trying criminals must be sought elsewhere, and especially in the early history of the judicial system. England was the first of modern nations to arise out of the wreck of the Roman Empire. Feudalism, with its loose connection between the overlord and his vassals, never became thoroughly established there, for the Norman kings had both the will and the power to prevent the barons from getting a large measure of independence. The most effective instrument for consolidating their authority was found in their courts of law, which steadily encroached upon the jurisdiction of the manors. Their policy was continued by the Angevins, until by the end of the reign of Henry II. the royal justice — exercised by the King's Court, or by itinerant judges commissioned to travel through the counties — was substantially universal in secular cases over the whole realm ; and this at a time when in France the immediate jurisdiction of the King was confined to the royal domain. In short, England centralized earlier than the continental countries, and her centralization took a judicial form. The result was, that out of the barbaric customs of the early Middle Ages her courts evolved legal principles which were strong enough to resist the direct influence of the Roman Law. To the Englishman that law did not seem, as it did to the Frenchman, a light in the darkness, a model of order in the midst of confusion. It appeared as a foreign rival to his own Common Law, which embodied his habits of thought, and was sufficiently enlightened for his needs. Moreover, one of the chief sources of the strength of the Roman Law in France — the means it afforded the King of extending his jurisdiction — did not apply on the other side of the Channel, because the royal courts there were already omnipotent. Hence, Roman legal



ideas made slow progress in England, and were adopted by the common-law courts only so fast as they could be reconciled with the native jurisprudence, and fitted into it. All this was quite as true of methods of procedure as of substantive legal principles. When the barbaric forms of trial began to fall into disuse, there was nothing in France, Germany, or Italy to take their place; so men turned to the Roman Law for guidance, and learned from it the inquisitorial process and torture. But in England the institution which afterwards grew into trial by jury was already established. It was still in a rudimentary form, no doubt, but it was perfect enough for the wants of the time, and it reached a higher and higher state of efficiency as civilization advanced. Thus, the early creation of a centralized judicial system in England kept the Roman Law with its encouragement of torture aloof, while the development of the jury obviated the need of copying Roman forms of trial.

Trial by jury did more than this. It did not merely furnish a mode of trial that rendered the inquisitorial procedure with torture as its adjunct unnecessary. It provided a form of trial with which the systematic use of torture was hardly compatible. In Scotland, it is true, torture was freely used at a late period, in spite of the existence of a jury, at least in capital cases; and the same was the case to some extent in Denmark. But with these exceptions it never got a firm foothold in Great Britain or Scandinavia, where trial by jury prevailed; and the reasons are almost self-evident. The torture could not very well take place in the presence of the jury. Such a thing would have been too shocking to men who were, after all, the neighbors of the prisoner; and if it was inflicted upon him in secret beforehand, he would be certain to recant at the trial, and tell how his confession had been wrung from him by suffering, with a strong probability of arousing a violent prejudice in his favor; for a jury would be very differently affected by such a scene than a body of magistrates hardened by constantly dealing with criminals. The chief reason, however, why trial by jury discouraged systematic torture, as it was used in France, must be sought in the absence of a theory of proof. That theory began to appear in Rome after the popular tribunals were replaced by permanent magistrates, and it was brought to perfection by French and Italian courts composed entirely of professional judges. It was, indeed, adapted only to trained legal minds. A body of laymen called together on a single occasion to try one

case, or even a series of cases, cannot be expected to regulate their belief in the innocence or guilt of the prisoner by any artificial rules. Nor can they be made to subordinate their personal convictions to fine-spun theories of proof enunciated by the judge. It is not always easy to make them accept the law as he lays it down, and they are sure to reach their conclusion about the facts in their own way, subject only to such influence as the argument in his charge may have upon them. As one would naturally expect, therefore, no theory of proof grew up in England, and except for sporadic statutory rules, such as the one requiring two witnesses in high treason, it never had any existence there at all. Hence the principles that made torture a regular part of criminal trials on the Continent were quite unknown in Anglo-Saxon law.

All these things prevented torture from becoming a systematic engine for extorting confessions in England, but they did not make its use an impossibility. They could not prevent its appearance altogether, and in fact it was used to some extent at one period of English history. How early the practice began is not known, although there is a tradition that the rack was brought to the Tower in the reign of Henry VI. by the Duke of Exeter, and it was called, for that reason, the Duke of Exeter's daughter. It was certainly there in the time of Henry VIII., and continued to be used during the reigns of his children and of the first two Stuarts, in spite of repeated opinions by the best lawyers that it was illegal. Torture is said to have been employed only when authorized by special warrant from the King or Privy Council, and most of the positive knowledge of the cases in which it was applied is derived from entries in the records of the Council. But its use was by no means confined to high treason or other offences against the safety of the State. It extended also to common-law crimes, — such as murder and robbery, — although for cases of this class it seems to have come to an end at the death of Elizabeth. For political offences it lasted somewhat longer. Guy Fawkes, for example, was probably tortured to force him to confess his guilt in the Gunpowder Plot, and it is certain that a warrant for the purpose was issued in the King's handwriting. Several other warrants of a similar character were made under James and Charles, and the practice was not abolished until the Commonwealth.

Whether torture was ever used during this period without a special authority from the King or not, its existence was closely connected with the growth of the royal prerogative. The Wars of

the Roses by destroying a great part of the nobility removed a check upon the Crown, and enabled the Tudor sovereigns to make the monarchy far more like that of France than it had ever been before. The resemblance showed itself in many ways, and among others in the treatment of criminals; for the procedure at that time had a decidedly inquisitorial cast. And, indeed, it is a remarkable fact that almost every institution to be found in the history of England or of France has its counterpart in the other country, at least in germ, although its growth on the two sides of the Channel has usually been very different. The accused was arrested, kept in confinement more or less close, and examined, — in ordinary cases by a justice of the peace, in those of great political importance by the Privy Council, — the examination being sometimes carried on, as we have seen, by means of torture. He had no counsel, apparently no right to summon witnesses, and was not allowed to know the evidence against him. This might be given at the trial in the form of depositions, for the government was not required to produce its witnesses in court. The result was that he was, or might be, given no opportunity to cross-examine them, while, on the other hand, he was himself elaborately questioned before the jury, and, in fact, his examination was the very essence of the trial. The resemblance to the treatment of criminals in France is evident.

This was the mode of conducting a prosecution in the King's Bench, and it was certainly inquisitorial. In fact, it was more so than that of the notorious Star Chamber, which has, nevertheless, been regarded by posterity as the typical instrument of tyranny. That famous tribunal attained its greatest influence under Queen Elizabeth, and dealt with crimes — such as forgery, perjury, riot, fraud, libel, and conspiracy — which were not capital, and were supposed to be insufficiently punished at Common Law. The complaint, like that in an ordinary equity suit, was made by a written bill which was shown to the accused, who was, moreover, assisted and defended by counsel. The prisoner was, indeed, required to answer interrogatories under oath, — the so-called *ex officio* oath, — and this became an object of intense dislike, and was looked upon as an intolerable grievance. But when we reflect that the prisoner submitted without objection to an examination in the King's Bench, it does not seem probable that the interrogation under oath would by itself have made the Star Chamber an object of hatred. The real sense of wrong arose from the purposes to which it was



applied, for the tribunal, sitting as it did without a jury, was used under the first two Stuarts as a means of ruthless political persecution, the punishments being entirely out of proportion to the offence, or inflicted for no real offence at all.

The Star Chamber was abolished in 1640, and about the same time some improvements took place in the procedure in the King's Bench. Torture was given up altogether; the prisoner was allowed to call witnesses, who testified, however, without oath; the witnesses against him were produced in court; and although he was still questioned before the jury, his examination was no longer the main part of the trial. But these changes did not prevent the scandalous use of prosecutions for high treason to destroy political opponents. There is no period in the history of the world where state trials play so large a part in political life as during the twenty-eight years between the Restoration and the Revolution. From the trial of the Regicides to the bloody assize of Jeffries there is a constant succession of convictions and executions which mankind has since regarded, rightly or wrongly, as judicial murders. It is hardly too much to say that most of the sentences for high treason pronounced at that time were afterwards condemned by public opinion; and it was natural that people should at last discover something wrong in a condition that made such things possible. The trials of Russell and Sidney, and the frightful miscarriage of justice in the Popish Plot, opened men's eyes to the defects of criminal procedure, and after the Revolution of 1688 statutes were passed allowing the prisoner to have his witnesses sworn in both treason and felony, and granting him in cases of high treason the benefit of counsel, a copy of the indictment, and a list of the witnesses and jurors. But the most important changes took place without any express statute. Prosecutions for crime were left more largely to private individuals, and the trial became once more a battle between two parties, the judge occupying the position of an arbiter, whose duty was only to see fair play. The episode of monarchy after the continental type, with all its accompaniments, had come to an end in England, and the political current of the nation returned to the channel it had left more than two centuries before.

Shortly after the Revolution another great change occurred in the method of dealing with the accused. Ever since the thirteenth century there had been a struggle to restrict the jurisdiction of the ecclesiastical tribunals, the favorite method of attack being

the enactment of statutes forbidding them to summon a layman charged with any offence and examine him on oath. The original motive for the acts was not a dislike of the oath, but a desire to free laymen from the jurisdiction of these tribunals by prohibiting the first step in their regular course of procedure. As often happens, however, the means finally became an end in itself. The oath became the substantive object of attack, and by the early part of the seventeenth century the practice of interrogating an accused person upon oath was denounced as a violation of the maxim, *Nemo tenetur prodere seipsum*.<sup>1</sup> The maxim used in this sense was really new, but it derived additional force from the hatred of the *ex officio* oath in the Star Chamber, until at last it was boldly asserted to be a part of the law of God and of nature. The Star Chamber was abolished in 1640, and statutes enacted in 1641 and 1662 forbade the administering of any oath whereby a person "may be charged or compelled to confess any criminal matter." The objectionable oath, therefore, was at an end; but the maxim had acquired a wider meaning, which covered all attempts to draw evidence from a prisoner against himself, whether he was forced to take an oath or not, — a principle which was the more popular because it was diametrically opposed to the use of torture then prevailing on the Continent and in Scotland. Accordingly the habit of questioning the prisoner, which lasted through the reigns of the Stuarts, died out shortly after the Revolution, and again there followed another change in his treatment. The Common Law had long excluded from the witness stand persons who had a direct interest in the result of a litigation, on the ground that they were under a great temptation to testify falsely. This theory of the lack of credibility of interested persons applied quite as strongly, in fact more strongly, to the parties to the suit than to any one else, and hence neither the plaintiff nor the defendant was allowed to take the stand. Now after the prisoner ceased to be questioned by the prosecution at his trial, it was logical for the lawyers to extend to him the principle of exclusion from the stand on account of an interest in the result, which except in his case had been of universal application. It was not long before this was done, and thus the accused, whose examination had furnished the chief element in the trials under Charles I., was not only not forced

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<sup>1</sup> For the origin, history, and transformations of this maxim, see the article by Professor Wigmore in the HARVARD LAW REVIEW, Vol. V., 71.



to testify one hundred years later, but was not even permitted to do so. His treatment, therefore, which had then closely resembled that of a prisoner in a French court, was now almost precisely the opposite.

In the United States the rule preventing the accused from testifying has been generally, if not universally, done away with by statute; but the Federal Constitution, and those of almost all the States, provide that he shall not be compelled to be a witness against himself. Whether such a provision is wise at the present day may well be doubted. If the French law protects the accused too little, it is questionable whether our law does not shield him too much. If the French criminal procedure is still too inquisitorial in character, trials in America have, perhaps, gone too far in the opposite direction. The idea that the trial is a battle, a fair fight, between two parties has taken such an exaggerated form that the importance to the community of the detection and punishment of crime is left almost completely out of sight. A sensational criminal case is popularly regarded as a game, in which the public takes much the same interest that it does in a yacht race or a prize fight. It likes to see the rules of the game observed without regard to their justice or fitness, simply because they are the rules of the game. It never considers how far those rules attain the real object of criminal procedure, the conviction of the largest possible proportion of guilty men that is compatible with the certainty of acquittal of the innocent. This is surely the true test, and we may fairly ask whether the privilege on the part of the accused not to testify is in accord therewith, or whether it is a legal survival that has lost its reason for existence, merely an approximation, and a very rough approximation, to justice, under a state of things that has passed away and made a more perfect approximation possible.

Taking the first half of the test, no one will deny that the rule in question hinders the punishment of guilty men. In many classes of crime, indeed, and those among the most injurious to the welfare of the community, conviction is almost impossible without putting the accused on the stand (or rather without permitting the jury to draw the natural inferences from his refusal to testify, for of course any other method of compulsion is out of the question). This is true of the bribery of public officials, of misconduct by the officers of corporations, and of many kinds of commercial fraud, not to speak of occasional mysterious murders. It is clear, therefore, that in certain kinds of offences, at least, the privilege protects the



guilty, tends to defeat the aim of the law, and ought to be abolished unless it can be shown that it lessens the danger of convicting the innocent. The general opinion of men who have had a large experience in criminal trials appears to be that it does not do so. There is a popular superstition that a clever lawyer can confuse and trip up any one by cross-examination, so as to make a perfectly truthful man appear to be lying; but every member of the bar knows how dangerous it is to cross-examine an honest witness, and some of the most skilful practitioners follow the rule of never asking a question unless they either know or do not care what the answer will be.

It may seem absurd, in view of the fact that the prisoner has now a right to testify, to suggest that the power to compel him to do so would be a positive benefit to the innocent, and yet it may very well be true in some cases. Innocent men always take the stand, and when they do not, the present rule is liable to prove a dangerous snare; for although the statutes which give the accused a right to testify provide that his not taking advantage of it shall raise no prejudice against him, and although the jury is always instructed not to allow his silence to affect their judgment, it does manifestly have a decisive influence on the verdict at times. It would not be difficult to cite cases where a presumption of guilt caused by the failure of the prisoner to tell his story can alone account for a conviction upon evidence otherwise quite insufficient. It may be added that the obligation to testify would often convince the public whether the prisoner is guilty or innocent, under circumstances where a widespread belief in his guilt now clings to him in spite of acquittal by a jury. A guilty man ought to be punished, and an innocent one ought, if possible, to be freed from all suspicion. It is not enough for justice or the public morals that he is saved from the actual penalty of the crime.

While the historic origin of a rule of law has very little direct bearing on the question whether it produces good effects at the present day or not, the hold of the principle on popular imagination is often due largely to historic associations. This is peculiarly true of the maxim that no one is obliged to furnish evidence against himself, and it may therefore be worth while to point out that the doctrine was at first proclaimed with the object of shielding the guilty rather than the innocent. As Stephen has remarked in his "*History of the Criminal Law*," it was most passionately insisted upon by men who had committed the acts with which they were

charged, but who looked upon the law that made those acts criminal as oppressive and unjust. In other words, it was claimed more as a loophole to escape the penalty of an odious law than as a protection to men who had not broken the law. But any such grounds for upholding the maxim are now gone, for no sensible man will assert that our criminal law is oppressive and unjust, or that people who violate it ought to be given a chance to defeat its enforcement. Moreover, it must be remembered that the privilege of silence is a very different thing to-day from what it was in the times when the practice of questioning the prisoner was dangerously associated with torture, when he had no counsel, no power to compel the presence of witnesses, no right to testify under oath, and when the prosecution could introduce almost any evidence, and the art of cross-examination had not been learned. Many other safeguards of innocence more effective than this privilege have since been invented, and they should be carefully preserved. If the change is made, the examination of the prisoner should be strictly limited. It should not be made until the rest of the evidence for the prosecution has been put in, and the government should be allowed to offer more evidence only to rebut new facts brought out by the prisoner or his witnesses. The questions should relate directly to the offence charged in the indictment, and not suffered to have the latitude ordinarily permitted in cross-examination. Above all, the protection of the prisoner against examination previous to the trial should be rigorously maintained. At present, no confession or admission made by him can be introduced in evidence, unless it was purely voluntary. If induced by any promise or threat of an officer of the government, it is excluded; and this rule should never be relaxed. It is the preliminary examination, rather than the questioning at the trial, that is the most objectionable feature of the French system of procedure. The real objection to the questioning at the trial in France lies in the fact that it is conducted by the judge, instead of the prosecuting attorney. But any preliminary examination of the accused, however conducted, offers, in the nature of things, a great temptation to oppressive and cruel treatment, and to prosecutions on insufficient grounds, while it tends to lessen the incentive to an independent and laborious search for evidence, and hence to a thorough investigation of the facts.

The history of criminal procedure both in France and in England has been deeply influenced by the growth of abstract legal theories. In France one theory made the examination of the pris-

oner under torture an essential part of almost every trial, while in England another theory, equally untrustworthy, excluded his evidence altogether. Torture has been abolished in France, and with us the evidence of the accused is now admitted if he chooses to give it; but in both countries the historical traditions are still extremely powerful. Of the two systems, as they stand, we believe that our own is far the better, and yet it would be presumptuous to assert that it has reached perfection.

*A. Lawrence Lowell.*



## REGISTRATION OF TITLE TO REAL ESTATE.

THE subject of this article is the advisability of substituting for the registration of conveyances the system of registering title known as Torrens's, especially in the case of an old commercial and manufacturing country, where dealings with real estate are complicated and titles often defective. I have experienced great difficulty in compressing this subject within the limits of an article. If my object had been merely to restate the leading features of the Torrens system, I should have had no difficulty; but these are so fully stated in easily accessible works, that I think their restatement would be of no service.

The object of every system of conveyancing is to relieve those who acquire interests in real estate for value and in good faith from the risks attendant on defects in title.

Prior to the reign of Henry VIII. this object was effected by an elaborate system of rules of law; which, however, also rendered impracticable the complicated dealings which the exigencies of modern life demand. In that and the immediately subsequent reigns these rules were almost wholly abrogated by legislation, by the decisions of courts of equity, and by changes in the customs of conveyancers, and the need of some other protection became felt. In 1669 a committee of the House of Lords advised the adoption of a system of registration, but, as regards the greater part of England, nothing was done in this direction.

A system of conveyancing, however, sprang up, which has answered almost equally well. Deeds are framed in so elaborate and formal a manner that an unprofessional person cannot imitate or even understand them. The law forbids any one but lawyers and certificated conveyancers to prepare them for remuneration. Professional men are invariably employed on all transactions respecting real estate. A title deduced through a chain of formal conveyances is held free from all informal dealings except those of which the transferee, his advisers, or agents, have knowledge or (until a recent statute) grounds of suspicion. The result is that it is rarely possible for a purchaser to be deceived, unless one of the

attorneys is party to the fraud ; and the penalty for such complicity, involving deprivation of the right to practise, is so severe that it is very rarely ventured on.

Nevertheless, in the reign of Anne, registries of conveyances were established for Ireland, and for two English counties, York and Middlesex,<sup>1</sup> and have since been established in most parts of the English-speaking world. The statutes establishing this system carry out its principle in various degrees ; the remodelled Yorkshire Acts (47-8 Vict. c. 54, amended by 48-9 Vict. c. 26) and the Irish Act being, I believe, the most perfect. The system can be best understood by assuming it to be carried to its logical conclusion. As so perfected, a means is provided for the registration of every transaction by which any interest in real estate is created, or dealt with, or transmitted by operation of law. But registration, though it protects transmitters and gratuitous grantees against the risk of being deprived (by a subsequent registered conveyance from their transmitter or grantor to another person) of the estate to which they are entitled apart from registration, yet does not give them any larger estate or better title than they would have possessed if no registry Act had been in force,<sup>2</sup> or protect them against being displaced by any means by which they might have been displaced if no such Act had been in force. It is disponees for value only who acquire a better title by registration. They, if acting in good faith, acquire by registration the same title as if all unregistered transactions by which title is derived from or through the grantor of the earliest registered deed through which their title is traced had not taken place, and as if all registered transactions by which title is derived from or through him had taken place in the order of time in which they are registered.<sup>3</sup> Of course, titles which are not derived through the grantor of the first registered transaction cannot be affected by registration. A registry Act always leaves the party at liberty to refrain from registration if they please. If, when the Act is first passed, A, being owner of land, conveys it to B, who does not register, and afterward to C, who does not register ; and C conveys to D, who registers, D only displaces any person to whom C may have conveyed before he conveyed to D. D does not, by his registration, improve C's title, or

<sup>1</sup> Irish Act, 6 Ann. c. 2, Ir. ; Yorkshire Acts, 2 & 3 Ann. c. 4 ; 6 Ann. c. 20, c. 62 ; 8 Geo. II. c. 6.

<sup>2</sup> Remodelled Yorkshire Act, 47-8 Vict. c. 54, § 14.

<sup>3</sup> Ibid. §§ 14 and 16 ; 15.

therefore displace B's. He may do that by registering C's conveyance, at least if he registers it before he registers his own; but otherwise B remains owner, and those deriving under him to the end of time take precedence over D. This rule preserves ancient rents, rights of common, rights of way, and the like, without any necessity for express reservation. And it is also usual to allow to short unregistered occupation leases the same priority as if they had been registered.<sup>1</sup> Claims of which the registering grantee or his agent had knowledge are also exempted under *most* registry Acts, and when an Act provides for the registration of some transactions only, the others retain the same priority as if registered.

Alike under the system of registering conveyances and under that of non-registration it is necessary to investigate the title. The investigator is always informed of the conveyance to the intending grantor, and traces title from him backwards for a period fixed by custom or statute, — forty, fifty, or sixty years, — and for a longer period if the transactions within that period suggest grounds for suspicion of an earlier flaw; and forward to ascertain whether the grantor has since dealt with the estate. If there is no register, he must depend on the good faith of the intending grantor and his advisers, and on the consecutiveness of the deeds, for information as to the transactions to be examined. If there be a register, he ascertains from indexes of grantors and grantees in what conveyances the intending grantor was grantee; and, by examining them, ascertains which affects the title in question, and so backward for the prescribed period, and forward in like manner. In some offices this labor is lightened by separate indexes of localities.<sup>2</sup> In Ireland the searches are made by the officials, and certified by the registrar who is responsible for mistakes and omissions;<sup>3</sup> and these certificates are kept with the title deeds, and obviate the necessity of repeating the search over the same period. After the searches have been made, the legal advisers of the parties must estimate the legal effect of the transactions disclosed; and this process has to be repeated on every transaction, unless the grantee's attorney is already familiar with the earlier title.

It is to obviate the necessity of these searches, and of the subsequent examination of the legal effect of the transactions, that the

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<sup>1</sup> Remodelled Yorkshire Act, 47-8 Vict. c. 54, § 28.

<sup>2</sup> Irish Act, 2 & 3 Wm. IV. c. 87, § 17; 11 & 12 Vict. c. 120, § 7.

<sup>3</sup> 2 & 3 Wm. IV. c. 87, § 26; 11 & 12 Vict. c. 120, § 4.



Registration of Title is designed. The statutes establishing it provide also for the investigation of the title by public officials, and for the extinguishment of all claims not discovered by them; but this is not an essential feature in the system, nor is it incompatible with either of the other systems; and I think I can explain the system more clearly if I suppose that the title prior to the first registration under the new system is allowed to remain with all its imperfections, while, owing to the method of conveyancing thenceforward adopted, new imperfections would not be allowed to creep in. The result would be that after the lapse of sixty years (or whatever period might be customary in searching title) an investigation would not require to be carried back beyond the time when the title was brought under the new system, except sufficiently to ascertain that the party who brought it under that system, or one under whom he derives, had purchased for value, so as to afford a presumption that he then investigated the earlier title.

Now the system of registering title, like that of registering conveyancing, can be best understood by assuming it to be carried to its logical conclusion. It never has been so carried out. All existing statutes and bills carry it out imperfectly. But their provisions will be much more intelligible if we prepare for their examination by imagining an ideal in which its principles should be carried out fully.

In order to do so we must first suppose the passage of a comprehensive statute for shortening deeds. The length of deeds is partly due to the habit of paying by length. But it is also due to the fact that the rules of law have not been altered to keep pace with changes in our social condition. The legal rules regulating the rights of persons in their dealings with real estate originated centuries ago, and were adapted to the social conditions then existing. When these conditions changed, it became necessary for parties to make laws for themselves, by inserting in every contract, deed, and will, clauses by which their rights might be regulated in substitution for the rules provided by law. By degrees, conveyancing lawyers invented clauses for this purpose, and inserted in each deed such of them as were appropriate to the transaction. Voluminous books have been published containing "precedents," or models for each class of deed, etc., and inserting in each the clauses appropriate to it. When a deed, etc., of any given class is prepared, the clauses appropriate to it are copied in from the books of precedents; and the clauses themselves, being of general application, are known as

"common forms" of conveyancing. Conveyancing, in truth, is a vast system of legislation by private enterprise, and, until these "common forms" are metamorphosed into rules of law, deeds cannot be reduced to short dimensions. Something has been done in this way in England.<sup>1</sup> Some of the common forms are by statute implied, and need not be expressed. But the alteration has been partial and unsystematic. Supposing it were made complete, deeds, etc., would contain no more than the date, the description of the parties and of the property, and the statement of the interest which the disponent is intended to acquire, and of the "consideration" or price which he pays for it. Such deeds could be prepared by filling up short printed forms. Let us suppose this reform accomplished.

Next let us suppose it enacted that any person, claiming to be entitled in fee simple to an area of land, including everything under or on the surface, may fill up a printed form declaring his claim, and register it as a conveyance should be registered under the existing system; and that the subsequent registration (under that system) of any transaction affecting the premises comprised in the declaration should be void so far as regards title derived under the declarant, but should retain its validity so far as regards title not derived under him. The effect of such a declaration would be to close the old register so far as regards any estate in the premises possessed by the declarant, but without giving him any estate beyond that (if any) which he possessed before.

Next, suppose it enacted that the registrar shall open new books for the purpose of registering, under the new system, those titles respecting which declarations have been registered. A declaration having been registered in the old books, a copy of it would be registered in the new books; and a certificate, stating that the declarant claims to have been entitled to the land in fee simple on such a day (stating the date of registering the declaration) would be issued by the registrar to the declarant.

Now let us take the simplest case first, and suppose that no partial interests are created by the declarant or those deriving under him, but that the estate is dealt with by wholly transferring it from one to another by deed or will. When a transfer by deed is made, a short printed form is filled up, and signed and registered as a deed would be under the old system; but it may not be registered unless the certificate previously issued be delivered up to the regis-

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<sup>1</sup> 44-5 Vict. c. 41; 38-9 Vict. c. 87, §§ 23, 24; so all the Registration of Title Acts.

trar to be cancelled.<sup>1</sup> He then issues to the transferee a new certificate, purporting that all such estate and title as was in the declarant when his declaration was registered is now in the transferee; and a clause in the statute gives effect to this by extinguishing all intermediate claims (if any), except such as the transferee may have agreed to be subject to,<sup>2</sup> and except such as may have arisen against him<sup>3</sup> (or if he pays no value) against his transferor by reason of his fraud or that of his transferor or a predecessor in title. But it does not appear that under the existing statutes, except the English Act of 1875,<sup>4</sup> he will be subject to claims arising from conduct which is not fraudulent, as when the obligation to confirm a will arises from accepting benefits under it; although on principle he ought to be subject to these also. A registered holder, subject to unregistered claims, can defeat them by making a registered transfer for value.<sup>5</sup> Until he has done so he is compellable to clothe them with the registered title, if they be registrable. The claims of persons in possession at the time of the first registration under the system are, by the statutes, preserved to them, so long as they continue in possession;<sup>6</sup> but this is not material under the suppositions we are making, that the declarant who first registers acquires no greater title than he had before.

As regards disposition by will and devolution on intestacy, the Acts differ. Under the English Act of 1875, the executor after probate, or the administrator, is to be registered as holder of leaseholds;<sup>7</sup> and a trustee, selected as the Act prescribes, is to be registered as holder of freeholds;<sup>8</sup> but either can transfer as complete a title as if he were owner,<sup>9</sup> and the parties beneficially interested can only protect themselves by caveats (described below). Under the New Zealand and Victoria Acts,<sup>10</sup> the same procedure is (substantially) followed as regards leaseholds; but, as regards free-

<sup>1</sup> Illinois Act of 1895, statute book, p. 107, § 39; Victoria (Australia) remodelled Act of 1890, 54 Vict. No. 1149, § 93; New Zealand Act, 33-4 Vict. No. 51, § 50. The English Act of 1875, 38-9 Vict. c. 87, leaves this to be provided for by rules to be made.

<sup>2</sup> Eng. 1875, § 8; Victoria, §§ 50, 69; N. Zealand, § 39; Illinois, § 29.

<sup>3</sup> Eng. 1875, § 98; Victoria, § 205; N. Zealand, §§ 46, 129; Illinois, § 29.

<sup>4</sup> Eng. 1875, §§ 7, 8.

<sup>5</sup> Eng. Act of 1875, §§ 33, 38; other Act, sections referred to under note 2.

<sup>6</sup> Eng. Act of 1875, § 18; Victoria, § 74; N. Zealand, §§ 129, 139; Illinois, § 29.

<sup>7</sup> Eng. 1875, §§ 42, 46.

<sup>8</sup> Ibid. §§ 41, 46.

<sup>9</sup> Ibid. §§ 46, 83 (1).

<sup>10</sup> Victoria, § 138; N. Zealand, § 85.



holds,<sup>1</sup> the heir or devisee gives such proof as he may be able to adduce, and the registrar gives publicity to his claim, and, if no objection is made within six months, registers him as holder, and he remains subject to all claims to which the deceased was subject, but can defeat them by a registered transfer to another. Under the Illinois Act (the provisions of which are adopted in the bill now before the British Parliament), a memorandum of the probate or administration is registered,<sup>2</sup> and the executor or administrator may deal with the premises in course of administration, and convey them to the parties ultimately entitled; but, as regards freeholds, only after obtaining permission from a court of competent jurisdiction. If the premises are willed to the executor, either for his own use or in trust, he may be registered as holder,<sup>3</sup> and stands in the same position as any other holder; and, if a power to sell be expressly given him, he may have the purchaser so registered.<sup>4</sup>

When the registered holder becomes bankrupt,<sup>5</sup> or assigns for his creditors, the assignee is registered, and holds subject to such claims as the bankrupt or assignor was subject to, except, of course, such as are void against such assignees.<sup>6</sup> But he can defeat such claims by making a registered transfer for value. In Illinois, an order of the court seems necessary to the validity of such a transfer.<sup>7</sup>

So far all is simple. But next, suppose that the declarant, or some subsequent holder of the fee simple, creates partial interests. If the principle of the system is to be logically worked out, all these interests must be capable of registration. In order to put the reader in possession of the reason why the system is difficult to work in a populous commercial and manufacturing country, it is necessary to classify all the partial interests which can be created, and to put a complicated case as an example of how the system would work if they could all be registered.

A landowner may convey away part of the land itself, dividing it vertically or horizontally. He may part with a field, retaining the rest, or he may part with the minerals, retaining the surface, or *vice versa*.

A landowner may create a "profit in prender," — a right to take

<sup>1</sup> Victoria, §§ 225-6; N. Zealand, § 86.

<sup>2</sup> Illinois, §§ 60, 61, 62.

<sup>3</sup> Ibid. § 63.

<sup>4</sup> Ibid. § 64.

<sup>5</sup> Eng. 1875, § 43; Victoria, § 236; N. Zealand, § 82; Illinois, §§ 69, 70.

<sup>6</sup> Eng. 1875, § 46; Victoria, § 236; N. Zealand, § 82.

<sup>7</sup> Illinois, § 70.

something from the land, as to take metals, coal, clay, gravel, trees, grass (or to put cattle in to graze), turf, fish (if the land be covered with water), etc.

A landowner may create an "easement," — a right to use his land in a specified manner, or to restrict his use of it, as, a right to walk or drive over it, to run a drain through it, to have the support of it for buildings on adjoining land, to have the light or the air which flows over it to adjoining land uninterrupted, to prevent the owner from opening a saloon on it; in fact, the restrictions which the owner may entitle another to impose on the use of the land are innumerable.

The owner of land, or of the surface or minerals, or of any profit or easement, may bind himself and all who may derive under him to pay a sum of money, or to allow it to be levied off the land; and this may be a lump sum, in which case the encumbrance is usually termed a mortgage, or a periodical sum, in which case it is a rent.

The owner of land, surface, minerals, profit, easement, or encumbrance, may transfer the ownership for a limited period, as for life, or for years; and that to begin either immediately, or at a future time, or on the happening of a contingency. Or he may grant a number of these partial interests, one to commence when another terminates. Or he may convey away the fee simple itself as from a future time, or as from the happening of a contingency, retaining it meanwhile.

And lastly, any estate or interest may be conveyed upon condition, so that if the condition be broken it reverts back to the transferor.

Now, when any partial interest is created, the deed by which it is created (or in case it be created by will a similar deed executed by the executor under the direction of the court after the executor's title has been registered) must (if the system is to be logically carried out) be entered in a separate registry book, as the starting point of a new title as distinct from that of the fee simple as that was from the title on the old register of conveyances. And if the holder of the fee simple in the land creates fifty subordinate interests, each one of them must, in like manner, form the starting point of a new title. But a memorandum of each must be noted on the register of the land, and also on the certificate of title to the land, in order that any subsequent purchaser of the land may know of it; and this memorandum must refer to the folio of the register on which a full statement of it may be found; and the certificate

must be brought in for this purpose before the grant of the partial interest can be registered. When this has been done, the registrar is to issue a certificate of title to the partial interest, just as he issued a certificate of title to the land; and subsequent dealings with the partial interest are to be conducted in the same manner, and with the same effect, as dealings with the land. And subsequent transferees of the land are to take subject to the partial interests noted on their transferor's certificate, and memoranda of the partial interests are to be copied on each successive registration of a transfer of the land, and on each successive certificate of title to the land; but, if the registrar should happen to omit any, the transferee of the land, though subject to it himself, because it was on his transferor's certificate, yet can, by making a transfer for value, extinguish it, unless, meanwhile, the mistake is discovered and rectified. The owner of a partial interest can extinguish it by registering a release of it; and in that case (as also if it was by the terms of the deed creating it to cease at a specified time, and if that time has expired), the memoranda of it are to be cancelled, and, on subsequent transfers of the land, are to be omitted.

If the owner of a partial interest creates a still lesser interest out of it, the same provisions apply *mutatis mutandis*, and so on *ad infinitum*.

Now, let us see how these rules would work out in case of such dealings with land as take place in real life.

Suppose A, being entitled to the land in fee simple, grants a perpetual right to take minerals to B, who leases it for twenty-one years to C, who mortgages his lease to D. Then, suppose A grants the land to E for life, and after his death to the heirs of F in fee, with proviso, that if F shall survive E, it shall pass, not to the heirs of F, but to the first son who may be born to G. The registration would stand thus:—

Book I. shows A entitled to the land in fee with memoranda of the following grants:—

1. Mining right to B.
2. Land to E for life.
3. Land to heirs of F in fee, commencing at E's death, and conditional on E surviving F.
4. Land to first son that may be born to G in fee, commencing at E's death, and conditional on F surviving E.

Book II. shows B entitled to take minerals in fee, with memorandum of lease to C.



Book III. shows C entitled to take minerals for twenty-one years, with memorandum of mortgage to D.

Book IV. shows D entitled to mortgage on lease of right to take minerals.

Book V. shows E entitled to land for life, with memorandum of mining right in B.

Book VI. shows F entitled to land in fee as from E's death, conditionally on E surviving F, with memorandum of mining right in B.

Book VII. shows G entitled to land in fee as from E's death, conditionally on F surviving E, with memorandum of mining right in B.

If, afterwards, F survives E, and E leaves no son, Books V., VI., and VII. must be closed; while if F survives E, and E leaves a son, or has had a son who leaves a representative, the same books must be closed, and A must convey to E's son, the conveyance being registered in Book I. But, in order that Books V., VI., and VII. may be closed, the above facts must be proved before and adjudicated on by some authority. Even the concurrence of all parties cannot obviate this, for the person claiming to be E's first son may not be really so. Either, therefore, the decision of a court of justice must be obtained, or the registrar or examiners must be intrusted with judicial powers.

But the above method of carrying out fully the principles of the system have been thought too complicated, and the statutes only carry them out partially. One method is adopted by the English Act of 1862 and the Ontario Act, another by the English Act of 1875 and the Australian Acts, and another by the Illinois Act. There is not space to explain all.

Leaving the Illinois Act for subsequent consideration, the Acts allow an estate in fee simple<sup>1</sup> in land (and some Acts also allow a rent-charge, a right of mining or way, or the like) to be brought under the Act. A leasehold may also be brought under it. After the fee or leasehold had been brought under the Act, a lease or mortgage may be noted on the register,<sup>2</sup> and may itself, with its subsequent title, be made the subject of a separate registration. But other partial interests are excluded from the register, and must still be dealt with under the old system. Yet there must be some

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<sup>1</sup> Eng. 1875, §§ 5, 82; Victoria, § 21; N. Zealand, § 21.

<sup>2</sup> Eng. 1875, Lease, §§ 11, 50, 51; Mortgage, § 22; Victoria, Lease, § 41.

means by which an intending transferee of a registered estate may be notified of these partial interests, and some way of preserving them from extinguishment by a registered transfer. These objects are effected by allowing any one who claims such a partial interest to lodge with the Registrar a "caveat,"<sup>1</sup> forbidding him to register a transfer without the caveator's consent, or until the lapse of a period after he has notified the caveator that a transfer has been delivered to him for registration. The caveator can get the period extended by showing sufficient grounds and giving security to indemnify any one who may be injured by the delay of the registration.<sup>2</sup> Meanwhile the caveator is expected, if he cannot arrange the matter with the transferee, to bring the question before a court of justice, and some of the Acts provide for having this done in a summary manner.<sup>3</sup> If, however, this is not done before the caveat lapses, the transfer may be registered; and its registration extinguishes the partial interest.

The objections to the caveat system are as follows:—

(1) If, when the land is transferred, it be determined to preserve the partial interest, the only way appears to be by a deed, or perhaps a written confirmation, from the transferee.

(2) If the transferee disputes the validity of the partial interest, the caveator must take the aggressive in bringing the matter before a court, though his object is merely defence. He cannot do this unless he is in a position to advance money; and if he is not prepared to act at once, he cannot have the time extended without giving security. If he is ill or abroad the evil is intensified. The notice may fail to reach him, and the negligence of a post-office clerk or the wreck of a mail steamer may cause the loss of a right which may be very valuable.<sup>4</sup>

(3) If the statute makes the caveator's consent necessary to the transfer, his absence, illness, or obstinacy may cause great loss to the transferee.

(4) If he holds in trust for persons unknown or unascertained, his negligence or misfortune may destroy their estate.

(5) The old register of conveyances must be preserved for dealings with these partial interests.

<sup>1</sup> Eng. 1875, § 54; Victoria, §§ 144-9; N. Zealand, § 88.

<sup>2</sup> Eng. Act, 1875, § 55; Victoria, § 145 (fin.).

<sup>3</sup> Eng. 1875, § 57. Under the Victoria Act, § 145, and the N. Zealand Act, § 89, the party desiring to transfer may bring the question before the court summarily.

<sup>4</sup> See especially Eng. 1875, § 90.

(6) If the statute authorizes only those who *are*, and not all who *claim to be*, partially interested to lodge a caveat (as the English Act of 1875 does), difficulty may arise in satisfying the registrar on that point.

(7) If otherwise, vexatious caveats may be lodged.

(8) If the caveator disposes of his interest among many, the number of caveats may become aggressively great.

The Illinois Act adopts a different system. When the fee simple has been registered, it permits registration of *any* partial interest except trusts, conditions, and limitations;<sup>1</sup> and when those are contained in a deed, will, etc., the transfer is to be made to the party entitled subject thereto, describing him as subject to a trust, etc., but without stating what it is; and no further transfer is to be made unless two examiners of title certify that such transfer is accordant with such trust, etc., in which case the transfer when registered extinguishes the trust, condition, or limitation.<sup>2</sup> The objection to this is that it commits judicial powers to the examiners, and this is the great blot on the Illinois system, which is otherwise much superior to, as it is vastly simpler than, the others.

But, it may be asked, what is to prevent two or more persons, though not really interested in the land, from registering inconsistent declarations, each claiming to be owner? The foregoing provisions do *not* prevent this. They leave the purchaser under the necessity, as other systems of conveyancing do, of ascertaining that the parties in possession claim by a title consistent with that appearing on the register. Clauses, however, have been introduced into the Registry of Title Acts for obviating this necessity. The English Act of 1862 requires, as a condition of bringing land under the Act, proof that the applicant has been in possession as owner for ten years, production of the last deed or will in the title, and a declaration by himself or his attorney that he believes him to be entitled.<sup>3</sup> The English Act of 1875<sup>4</sup> authorizes rules to be made requiring notices and evidence. The Illinois and Australian Acts require investigation and proof of title.<sup>5</sup> But all these rules could be applied under the old system as well as the new.

<sup>1</sup> Illinois, §§ 7, 48.

<sup>2</sup> Ibid. §§ 57, 58.

<sup>3</sup> Eng. 1862, § 25.

<sup>4</sup> Eng. 1873, §§ 4, 6, III.

<sup>5</sup> Illinois, §§ 14, 15; Victoria, §§ 22, 23; N. Zealand, § 24, *seq.*



The acquisition of a title by long possession seems inconsistent with any system of holding title by documentary evidence; but the necessity just referred to of ascertaining that the title is consistent with the possession shows that it cannot be dispensed with, except when some means for insuring that the registered title shall be consistent with the possession have been adopted,—as in the statutes just referred to. Such statutes, however, generally contain provisions for preventing the acquisition of title by possession.<sup>1</sup>

The necessity for protecting against forgery is not so great under the new system as under the old, because under the former the transferor's certificate of title must be produced when a transfer is registered. But, if the certificate be stolen, a forged transfer can be registered; and some better protection against forgery than that explained in 6 HARVARD LAW REVIEW, 303, as existing in Massachusetts, will be necessary.

The extinguishment of claims adverse to the registered title is always provided for by Registry of Title Acts,<sup>2</sup> but has also been provided for in England and Ireland independently of them.<sup>3</sup> Sometimes these claims are extinguished immediately, sometimes after an interval; but in this country the constitutionality of the former course is doubtful, and the Illinois bill adopts the latter, allowing five years, with an additional term for future interests if noted on the register within the five years.<sup>4</sup> In fixing the period the essential point is that it shall be definite. Statutes of limitation generally provide that when a claimant under age or insane recovers from his disability, when a claimant who is abroad returns, when a claimant unascertained becomes ascertained, or when a future claim falls into possession, a limitation period shall begin again. In order to make titles clear, such re-commencements must be avoided. The constitutionality of barring persons under disability has been doubted, but I think inadvisedly. The Illinois Act does not give them a new period,<sup>5</sup> but allows their guardians, etc., to take proceedings on their behalf. It is also essential to the efficacy of the system that the remedy of claimants should be, not the vacating of the registered title, but the requiring

<sup>1</sup> Eng. 1875, § 21; Illinois, § 30.

<sup>2</sup> Eng. Act of 1862, § 20; Eng. Act of 1875, § 7, and see § 8; Victoria, § 69; N. Zealand, § 39; Illinois, § 29.

<sup>3</sup> Eng. Declaration of Title Act, 25-6 Vict. c. 67; Ireland, Landed Estates Court, 21-2 Vict. c. 72; especially §§ 51, 53; 28-9 Vict. c. 88, § 5.

<sup>4</sup> Illinois, § 37.

<sup>5</sup> Ibid.

a registered confirmation from the registered holder, thus defining the claim, and continuing to the public the benefits of the new system. The constitutional questions are discussed in 6 HARVARD LAW REVIEW, 312, 411, 412; 3 Western L. J. 289.

Statutes which allow an immediate or short bar of claims always provide that the title be investigated by public examiners, and that persons in possession be notified, and claimants advertised for and heard;<sup>1</sup> and all claims which are held valid are preserved, and noted on the register.<sup>2</sup> Under a perfect system they would be formally extinguished, and re-created by registered grants from the registered holder of the fee simple. It would be a wise provision that, in cases where the title had not been investigated, assent of the parties in possession, and publication of the fact that the title had been brought under the new system, should bar all adverse claims not asserted within twenty years.

In the British Parliament strong objection has been expressed against allowing a registrar or examiners to adjudicate on questions of title,<sup>3</sup> but a reference is generally allowed to a court.<sup>4</sup>

All the statutes exempt certain claims from extinguishment.<sup>5</sup> These generally include (besides the rights of eminent domain and escheat), minerals, old rents, profits in prender, and easements, unpaid assessments, and the rights of persons in possession at the time when the premises are first brought under the new system. It would be better to allow the holder to resist these claims until brought on the register. Short occupation leases are always preserved, whether created before or after the premises are brought under the system.<sup>6</sup>

Space does not allow of more than an allusion to the question of maps and boundaries. The exact determination of boundaries is not essential, but the statutes generally provide means for determining them if desired.

*H. W. B. Mackay.*

<sup>1</sup> Eng. Act of 1862, §§ 5, 6; 1875, § 6; Declaration of Title Act, § 6; Irish Landed Estates Ct. Act, § 51; Victoria, §§ 22, 23; N. Zealand, § 23; Illinois, § 14.

<sup>2</sup> Eng. Act of 1862, § 20; 1875, § 9; Victoria, § 23; N. Zealand, § 38; Illinois, §§ 14, 17.

<sup>3</sup> Hansard, 1862, clxvii. 245, 250, 253, and many other passages.

<sup>4</sup> Eng. Act of 1862, § 6; 1875, §§ 74-77; Victoria, § 33; N. Zealand, § 31; Illinois, § 81.

<sup>5</sup> Eng. Act of 1862, § 27; 1875, § 18; Victoria, § 74; N. Zealand, §§ 46, 129, 139; Illinois, § 29.

<sup>6</sup> Eng. Act of 1862, § 27; 1875, § 18 (7); Illinois, § 29.

## WARRANTIES AND SIMILAR AGREEMENTS.

**I**N the decisions upon the subject of warranties and stipulations of that nature it is true that there is some confusion, but its extent is often overstated. Many of the opinions on the subject are much worse than the actual decisions. Rejecting the bad opinions and accepting the decisions, we find the rules followed by the courts of different jurisdictions very nearly uniform.

There is much misuse of the term "warranty." It is applicable properly only to agreements which are collateral to the main object of a contract of sale, namely, the passage of title; but it is frequently applied to agreements and conditions which are not collateral to the passage of title, but without the fulfilment of which no title can pass. A correct use of the term is important chiefly when it becomes necessary to consider what remedy is proper where the contract has not been fully performed, and but incidentally when it is being determined what the contract originally included.

The fact that a certain provision, if it existed, would or would not be a warranty, as distinguished from a part of the principal contract of sale, has no direct bearing on the question of the existence of the provision. The usual criterion by which to determine that a particular provision is a warranty is that the contract relates to specific goods, and the provision is intended to continue in force after the passage of title. To say that a certain provision shall or shall not be implied in a contract because it will or will not be a warranty makes its existence depend in a measure on the fact that the contract relates to specific or non-specific goods. That dependence is to be placed on that fact is frequently stated, but the point is seldom involved in a decision. To make the protection which a buyer may reasonably expect depend on the opportunity that he has to inspect the goods which he buys, or on the reliance which he reasonably places upon the seller's judgment or skill, is reasonable. To make it depend on the fact that the goods are or are not specific is arbitrary. There is no reason which commends itself why a buyer who orders cotton generally should be entitled to a quality better than that which he could have required if he had bought a specific bale. Fortunately there are many cases



which are decided as if there were no distinction, but unfortunately there are too few in which the distinction is expressly disregarded. There is no exception to the rule of *caveat emptor* which has been uniformly made to depend upon a distinction between specific and non-specific goods. Therefore in considering what agreements are implied in a contract of sale, we are not assisted by dividing the subject on a theory dependent upon this distinction.

In a sale of goods, or a contract to supply them, it frequently happens that a buyer who has received an express agreement concerning the quality or adaptability of his purchase, wishes to rely on the agreement which would have existed by implication but for the express one. The express provision does not necessarily exclude any implied agreement.<sup>1</sup> If, however, it covers the same general subject-matter it does exclude any implied agreement.<sup>2</sup> Just where the line lies is not a question which belongs properly with the present discussion. It is an independent subject, which is mentioned but incidentally.

Another matter, foreign to the present, but so intimately connected therewith that it should be mentioned, is that of usage and custom. Some effect will be given to a usage or custom in its bearing upon a contract of sale and its fulfilment. It must be universal in the particular trade in which the contract is made<sup>3</sup> and must not contradict settled rules of law.<sup>4</sup> It is said that one may be enforced which tends merely to explain the meaning and intention of the parties.<sup>5</sup> It should be a regulation of the method of doing business, and not a determination of the legal results of unequivocal acts. A custom limiting the time during which goods might be rejected has been enforced.<sup>6</sup> This subject should be considered as an independent topic.

The well-settled rule in sales is *caveat emptor*, a rule which has many exceptions. These all rest upon one or the other of two

<sup>1</sup> *Bigge v. Parkinson*, 7 Hurl. & Norm. 955.

<sup>2</sup> *International Pavement Co. v. Smith, Beggs, & Ranken Machine Co.*, 17 Mo. Ap. 264; *Wood Mowing and Reaping Machine Co. v. Bobbst*, 56 Mo. Ap. 427; *White v. Gresham*, 52 Ill. Ap. 399.

<sup>3</sup> *Snow v. Shomacker Mfg. Co.*, 69 Ala. 111.

<sup>4</sup> *Thompson v. Ashton*, 14 Johns. (N. Y.) 316; *Rice v. Codman*, 1 Allen (Mass.), 377; *Dickinson v. Gay*, 7 Allen (Mass.), 29; *Barnard v. Kellogg*, 10 Wall. 383. But see *Fatman v. Thompson*, 2 Disney (Oh. Super.), 482.

<sup>5</sup> *Barnard v. Kellogg*, 10 Wall. 383.

<sup>6</sup> *Carleton v. Lombard*, 72 Hun (N. Y.), 254; *The Chicago Packing and Provision Co. v. Tilton*, 87 Ill. 547.

grounds, — the reliance naturally placed by a buyer on a seller's statements or superior knowledge, and the advisability of protecting buyers who have no opportunity to inspect the goods which they are buying. Primarily, the first of these rests on the position of the seller, and the second on that of the buyer. One naturally relies upon the descriptive statements of the person from whom he buys, or, if the latter is in a situation to know more of the qualities of an article or of its adaptability to a particular use, the former naturally defers to the knowledge of the latter. In one case an additional undertaking is implied from the seller's words, and in the other from his position. Where the seller makes no statements and occupies no better position than the buyer, there may still be an undertaking implied, if goods are bought which there is no opportunity to inspect. It is of advantage to the public to encourage trade in goods lying at a distance. A buyer should be made to feel as safe in dealing with such goods as he is when he has an opportunity to inspect before buying. This is without regard to the seller's statements or knowledge of the goods. He is holden to an undertaking to protect the buyer who is to receive from him goods on which he has never been given an opportunity to exercise his judgment. The first exception requires that goods shall correspond to the description of them in kind and quality, and shall in certain instances be adapted to the purpose for which they are sold; and the second, that goods sold by description, and which the buyer has no opportunity to inspect, shall be of a merchantable quality. When neither ground for exception exists, the rule of *caveat emptor* applies.

One of the most common ways in which goods are described is by reference to a sample. To have a sample affect a case it must appear that a sale by sample was contemplated. This involves a question of fact simply. As is the case with other such questions, the evidence will sometimes be so clear that the court will be required to direct a verdict. The mere production and display of a sample are not sufficient to make a sale one by sample.<sup>1</sup> When a sample has been shown to the buyer, there will sometimes be other circumstances which will make it wrong for the court to allow the jury to find that the sale was by sample.<sup>2</sup> The fact that the buyer was given an opportunity to inspect the goods as well as

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<sup>1</sup> Proctor v. Spratley, 78 Va. 254; Walter A. Wood Harvester Co. v. Ramberg, 61 N. W. R. (Minn.) 1132.

<sup>2</sup> Selser v. Roberts, 105 Pa. St. 242.

the sample strongly indicates that a sale by sample was not contemplated,<sup>1</sup> and should generally be conclusive. It cannot fairly be said that a seller who shows a sample, and at the same time tenders to the buyer an opportunity to see the goods, manifests an intention to undertake that the goods are equal to the sample. The fairer inference is that he wishes the buyer to satisfy himself of the quality of the goods by an inspection before purchase. There may be qualities apparent in the sample which are not apparent upon an inspection of the bulk of the goods. As to these the buyer cannot properly be said to have had an opportunity to inspect, and his right to corresponding qualities in the bulk should not be held to be impaired. To that extent the sale may still be one by sample. To establish a sale by sample it is generally said that it must appear that the sale was made solely with reference to the sample.<sup>2</sup>

A sale by sample is not essentially different from a sale by description. It is a sale by description by reference to the sample. The extent of this description varies. If the parties contemplate that the sample shall be subjected to some test, the reference to the sample is a description of whatever qualities or defects this test will disclose. It is generally a description of whatever the sample presents to the sight or other senses.

The goods must correspond in kind and quality to the sample. In conflict with this almost universal rule it is held in Pennsylvania that the goods need correspond only in kind and not in quality with the sample.<sup>3</sup> Where goods are described by words as well as by sample, they must correspond to the express description<sup>4</sup> as well as to the sample.

Where the goods are defective, the fact that the sample is defective in the same particular will not lessen the seller's liability, provided the defect was not perceptible on an examination of the sample.<sup>5</sup> The reason for this is that no more is described by a reference to a sample than appears on an inspection of it. Conversely, where the goods are defective in a particular which is not perceptible on an inspection of the sample, the fact that the sample did not contain this defect should not increase the seller's liability. This follows from the same reason. This view has

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<sup>1</sup> *Barnard v. Kellogg*, 10 Wall. 383.

<sup>2</sup> *Nichol v. Godts*, 10 Exch. 191.

<sup>3</sup> *Sidney School Furniture Co. v. School Dist. of Warsaw*, 7 Atl. Rep. (Pa.) 65.

<sup>4</sup> *Nichol v. Godts*, 10 Exch. 191; *Gould v. Stein*, 149 Mass. 570.

<sup>5</sup> *Moody v. Gregson*, L. R. 4 Exch. 49; *Drummond v. Van Ingen*, 12 App. C. 284.



been indicated in a conservative *dictum* in which it was suggested that a dealer selling by sample would not be liable for latent defects in the goods which did not occur in the sample, and which arose from the work of former growers or manufacturers.<sup>1</sup>

The cases generally make no distinction in sales by sample between specific goods, non-specific goods, and those not manufactured at the time of the formation of the contract. There should be no distinction. A buyer naturally relies on the description which the sample conveys to him, as much where he knows that the goods which he is purchasing bear particular marks and are stored in a particular place as where he knows that no goods are yet in existence.

Where there is an express description of the goods, the expression may be a statement of the seller's opinion merely, or it may be a representation of fact. This depends upon the intention in the use of the words, which is to be inferred from all the circumstances, and should be decided by the jury.<sup>2</sup> The circumstances may be such that it will be the duty of the court to order a finding the one way or the other.<sup>3</sup> The circumstance which has the most important bearing upon this question is that the buyer did or did not have an opportunity to inspect. The fair inference is that any statements concerning the things which are apparent upon inspection were of opinion merely, if there was an inspection. Where there is no inspection, or where an inspection will reveal nothing, the opposite inference is fairer. The circumstance that the seller occupies a position of vantage through his superior skill or knowledge tends to show that the statement was more than one of opinion.

What is an opportunity to inspect should be treated as a question of practical business.<sup>4</sup> It may exist although inspecting would be laborious and unusual,<sup>5</sup> but does not where the value of the goods would be greatly diminished by an inspection.<sup>6</sup> An opportunity to inspect is not always tantamount to an inspection.<sup>7</sup>

Where the seller occupies no better position than the buyer, the

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<sup>1</sup> *Bradford v. Manly*, 13 Mass. 139.

<sup>2</sup> *Power v. Barnum*, 4 Ad. & El. 473; *Ransberger v. Ing*, 55 Mo. Ap. 621.

<sup>3</sup> *Jendwine v. Slade*, 2 Espinasse, 572.

<sup>4</sup> *Beals v. Olmstead*, 24 Vt. 114.

<sup>5</sup> *Barnard v. Kellogg*, 10 Wall. 383.

<sup>6</sup> *Lewis v. Rountree*, 78 N. C. 323.

<sup>7</sup> *Gould v. Stein*, 149 Mass. 570.

sale is on inspection, and the goods are specific, a description of the species of the goods by the seller should not impose upon him any liability, but should be treated as a statement of opinion, or, better, a statement made solely for the purpose of identifying the subject-matter of the sale. It would be generally so held. To this extent it is true that in the present sale of specific, inspected goods there is no implied warranty. Where, however, the species of the goods is not perceptible on inspection, the finding that the description by the seller of the kind of the goods is an undertaking by him, and not merely an expression of opinion that the goods are of the kind described, is not only permissible,<sup>1</sup> but perhaps necessary.<sup>2</sup> In the absence of qualifying facts, it should be necessary, as the position of the buyer is the same that it would have been if there had been no inspection, and he naturally relies on the seller's statement as much as he would have relied had there been no inspection. The two prominent early New York cases<sup>3</sup> in which the opposite finding was sustained are virtually overruled. In Pennsylvania it has been held that a finding that the description by the seller is an undertaking by him is not permissible.<sup>4</sup> This seems a trifle inconsistent with an earlier decision<sup>5</sup> holding that there was such an undertaking where, although no inspection, there was an opportunity to inspect, and a difference in kind apparent upon inspection. This case is readily distinguishable from the others in the fact that there was no actual inspection.

Where the seller occupies no better position than the buyer, the sale is on inspection, and the goods are not specific, the rules should be the same that they are where the goods are specific. If inspection discloses the kind, a description of kind should be held not to be an undertaking. If inspection does not disclose the kind, the case should be decided as it would have been had there been no inspection.<sup>6</sup> The force to be given to a description of goods by a seller should depend upon the reliance which the buyer will naturally place upon it, and that reliance will not be affected by the fact that the goods are or are not specific. It would probably be held that this fact did not affect the obligation of the seller.

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<sup>1</sup> *Wolcott v. Mount*, 7 Vroom (N. J.), 262; *Sparling v. Marks*, 86 Ill. 125.

<sup>2</sup> *Hawkins v. Pemberton*, 51 N. Y. 198. See also *Jones v. George*, 61 Texas, 345.

<sup>3</sup> *Seixas v. Wood*, 2 Caines (N. Y.), 48; *Swett v. Colgate*, 20 Johns. (N. Y.) 196.

<sup>4</sup> *Lord v. Grow*, 39 Pa. St. 88; *Shisler v. Baxter*, 109 Pa. St. 443. See also *Kircher v. Conrad*, 23 Pac. R. (Mont.) 74.

<sup>5</sup> *Borrekins v. Bevans*, 3 Rawle (Pa.), 23.

<sup>6</sup> *Lewis v. Rountree*, 78 N. C. 323.

Where the sale is not on inspection and the goods are specific, a description of the species of the goods by the seller should be held to be an undertaking by him that they are of the kind described.<sup>1</sup> It is evident that a buyer who has not had an opportunity to inspect is entitled to as much protection and relies as much on a seller's statements as a buyer who has inspected goods the species of which is not perceptible on inspection. The rights of the latter have just been considered. The rule should be the same where the goods are specific that it is where they are not. The reason for this is suggested in the preceding paragraph. It would probably be so held.

Where the sale is not on inspection and the goods are not specific, it is well settled that a description by the seller of the kind of the goods is an undertaking by him that they shall be of that kind, or, as is usually said, the goods must be of the kind specified in the contract.<sup>2</sup>

What has been said concerning statements regarding species applies to those regarding quality. The fact that there is no inspection, or that the quality is not perceptible on inspection, or that the goods are specific, has substantially the same effect in determining whether a statement regarding quality was a representation of fact or of opinion that it has in determining the same question where the statement relates to kind. Where the statement is a representation of fact, it places upon the seller an obligation that the goods correspond in quality to the description;<sup>3</sup> but if it is merely an expression of opinion, it does not affect his liability.<sup>4</sup> The former is part of the contract, while the latter is not. The tendency is to treat all material statements concerning quality as part of the contract. A reason which would frequently justify giving more effect to statements concerning quality than to those concerning kind is that a description of kind is frequently necessary for the purpose of identifying the subject-matter of the sale, which is more seldom true of a description of quality.

Where the positions of the buyer and seller are equal, nothing is said concerning quality, the goods are purchased upon inspection,

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<sup>1</sup> *Lyon v. Bertram*, 20 How. 149 (*dictum*); *Borrekins v. Bevans*, 3 Rawle, 23; *Barr v. Gibson*, 3 M. & W. 390 (*dictum*).

<sup>2</sup> *Nichol v. Godts*, 10 Exch. 191; *Weiler v. Schilizzi*, 17 C. B. 619; *White v. Miller*, 71 N. Y. 118; *Gould v. Stein*, 149 Mass. 570; *Coyle v. Baum*, 3 Oklahoma, 695.

<sup>3</sup> *Hobart v. Young*, 21 Atl. R. (Vt.) 612.

<sup>4</sup> *Ransberger v. Ing*, 55 Mo. Ap. 621.



and are specific, there is no undertaking by the seller that they are of any particular quality.<sup>1</sup>

Where the goods are not specific, the rule should be the same.<sup>2</sup> There is no reason for a different rule. Although a number of decisions are limited expressly to the case of specific goods, yet many have been made in which the difference between specific and non-specific goods has not been mentioned. The rule may be safely said to be the same for each.

In South Carolina the rule seems to be that there is a warranty of quality in the sale of specific goods on inspection.<sup>3</sup> This has been said to be limited to latent defects,<sup>4</sup> and it has been held to be proper to leave the question of its existence to the jury.<sup>5</sup> One early case is decided as if the rule in South Carolina were the same as elsewhere.<sup>6</sup> The later cases in overruling this appear not to have noticed it. The rule is commonly stated in the form that a sound price implies a warranty of soundness.<sup>7</sup> The decisions in which this is reiterated are sustainable upon other grounds,<sup>8</sup> but in view of the frequency of the repetition of the statement it may be regarded as settled law.

Where there is no opportunity to inspect and the goods are specific, it should be held that there is an undertaking by the seller that they are of a merchantable quality. It is so held in the case of non-specific goods, and the rule should not be different in the case of specific goods. The reason for the rule requiring a merchantable quality in any case is that the needs of business demand that a buyer trading at a distance should be protected as fully as one who buys after inspecting. This reason is as applicable where the goods are specific as where they are not. It has been intimated that the rule differs in the two cases,<sup>9</sup> while in some decisions it has been stated broadly without reference to any

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<sup>1</sup> *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; *Parkinson v. Lee*, 2 East, 314; *Emmerton v. Matthews*, 7 H. & N. 586; *Barnard v. Kellogg*, 10 Wall. 383; *Moses v. Mead*, 43 Am. Dec. (N. Y.) 676; *Rayner v. Rees*, 27 Chic. Leg. News, 296; *Needham v. Dial*, 4 Tex. Civ. Ap. 141.

<sup>2</sup> *T. B. Scott Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667.

<sup>3</sup> *Vaughan v. Campbell*, 2 Brevard (S. C.), 53.

<sup>4</sup> *Rose v. Beatie*, 2 N. & McC. (S. C.), 538.

<sup>5</sup> *Whitefield v. M'Leod*, 2 Bay (S. C.), 380.

<sup>6</sup> *Neilson v. Dickenson*, 1 De S. (S. C.), 133.

<sup>7</sup> *Lester v. Excs. of Graham*, 1 Mill (S. C.), 182.

<sup>8</sup> *Timrod v. Shoolbred*, 1 Bay (S. C.), 324; *Barnard v. Gates*, 1 Nott & M. (S. C.), 142; *Missroon v. Waldo*, 2 N. & McC. (S. C.), 76; *Bulwinkle v. Cramer*, 27 S. C. 376.

<sup>9</sup> *McClung v. Kelley*, 21 Iowa, 508; *Hood v. Bloch*, 29 W. Va. 244.

distinction.<sup>1</sup> In the leading case on the subject the court states that it knows of no case in which the rule of *caveat emptor* has been applied where there has been no opportunity to inspect or no waiver of such an opportunity.<sup>2</sup> The Massachusetts court remains tentative concerning the distinction.<sup>3</sup> It probably does not exist generally.

Where there is no opportunity to inspect and the goods are not specific, it is settled that there is an undertaking by the seller that they shall be of a merchantable quality; that is, of a quality merchantable under the description of them contained in the contract.<sup>4</sup>

This undertaking by the seller should be so limited that it would not cover lack of merchantability arising from defects not apparent on inspection. This limitation is one which has not been distinctly made, although it is involved in at least one recent decision,<sup>5</sup> but seems not to have been recognized. It applies equally where the goods are specific and where they are not. The reason for requiring a merchantable quality is to protect a buyer who has no opportunity to inspect, as fully as one is protected who does inspect; but in the absence of the limitation suggested the former is more fully protected than the latter. The opportunity to inspect enables the latter to guard against defects in quality which are apparent, but he still runs the risk of all hidden defects. The former should run the same risk. It is uncertain whether this limitation will receive any support. It certainly deserves it. To hold that a buyer who purchases goods which he has never seen is protected if they have a defect which cannot be discovered, which renders them unmerchantable, while holding that the same buyer, had he seen the same goods before purchasing, would have been without protection, is a ruling that has little to commend it.

Where the seller occupies a position of vantage over the buyer, through his superior skill or knowledge, his undertaking is greater than is that of an ordinary seller. The most common instance of this is where he is a manufacturer or grower, but it should not be

<sup>1</sup> Gardner v. Gray, 4 Camp. 144; Carleton v. Lombard, 72 Hun, 254.

<sup>2</sup> Jones v. Just, L. R. 3 Q. B. 197.

<sup>3</sup> Murchie v. Cornell, 155 Mass. 60.

<sup>4</sup> Gardner v. Gray, 4 Camp. 144; Laing v. Fidgeon, 6 Taunt. 108; Jones v. Just, L. R. 3 Q. B. 197; Hood v. Bloch, 29 W. Va. 244; Murchie v. Cornell, 155 Mass. 60; Alden v. Hart, 37 N. E. R. (Mass.) 742.

<sup>5</sup> Healy v. Brandon, 66 Hun, 515.

confined to these cases. The reason for this additional undertaking is that the buyer naturally relies upon the judgment of a seller whose knowledge or skill is superior to his own. From the fact that a seller is a manufacturer or grower, it is fairly presumed that he has this superiority. Hence it has been settled that these two classes of sellers undertake more of a liability than others. When, however, circumstances indicate that the seller, although not of these classes, has this superior knowledge or skill, and that this fact affected the buyer, the seller should be held to the greater undertaking.

Where the seller is the manufacturer and the goods are made to order, there is an undertaking by him that they are free from defects in the process of manufacture.<sup>1</sup> The rule should be, and probably is, the same where the goods are not made to order but are not specific,<sup>2</sup> and even where they are specific.<sup>3</sup> The buyer naturally relies upon the manufacturer as much in the last instance as in the first. A grower's undertaking is substantially the same as that of a manufacturer;<sup>4</sup> that is, there is an undertaking by the grower that his product is free from defects arising from the method or process of culture.

The undertaking by the manufacturer should not be held to extend to defects in the material which he uses if they are not discoverable during the process of manufacture.<sup>5</sup> It is uncertain whether this limitation will be generally recognized. It is a proper one. The manufacturer's undertaking should be coextensive only with his superior opportunity, but he has no opportunity to guard against any defects except those which result from the process of manufacture or are discoverable during that process.

Where the buyer inspects the goods before purchasing, the manufacturer's undertaking should not be held to cover defects which are apparent on inspection to a person of the buyer's skill.<sup>6</sup> That he inspected has a tendency to show that he relied upon his own knowledge and skill rather than that of the seller, and to the

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<sup>1</sup> *Drummond v. Van Ingen*, 12 App. C. 284; *Hoe v. Sanborn*, 21 N. Y. 552; *Carleton v. Lombard*; 72 Hun, 254 (*dictum*).

<sup>2</sup> *Pease v. Sabin*, 38 Vt. 432.

<sup>3</sup> *Jones v. Bright*, 5 Bing. 533; *Larson v. The Aultman & Taylor Co.*, 86 Wis. 281.

<sup>4</sup> *Beals v. Olmstead*, 24 Vt. 114; *White v. Miller*, 71 N. Y. 118.

<sup>5</sup> *Hoe v. Sanborn*, 21 N. Y. 552 (*dictum*); *Bragg v. Morrill*, 49 Vt. 45; *Wilson v. Lawrence*, 139 Mass. 318; *contra*, *Jones v. Bright*, 5 Bing. 533.

<sup>6</sup> *Barnett v. Stanton*, 2 Ala. 181.



extent to which he did so he should not be protected. It would probably be held that the seller was not liable for these defects.

The undertaking of a seller of provisions has been treated occasionally as if it were an exception to the general rule, but this is unwarranted. In an ordinary sale of provisions, the seller's undertaking is not different from that of a seller of any other article.<sup>1</sup> Where the seller is a dealer and the buyer a consumer, there is probably an undertaking that the provisions are suitable for consumption;<sup>2</sup> but even this has been more frequently assumed than decided. It has been stated that it rested upon certain early penal statutes prohibiting the sale of unwholesome food, and at other times that it was a requirement of public policy. Whatever the origin of the rule, the best reason for it — one which fully justifies it — is that a dealer has skill and opportunity superior to that of the consumer which makes it natural that the latter should rely upon the former. It follows that the undertaking of a dealer in provisions who sells to a consumer should be gauged by the same measure which regulates the undertaking of any other seller who occupies a position of superiority and sells an article to be used for a particular purpose. It has been held properly that there is no undertaking by a dealer in provisions where it is evident that the buyer could not have relied upon the former's skill or knowledge.<sup>3</sup> The dealer's undertaking should be held to exist whether the provisions are specific or not, but should not extend to defects which are evident on inspection, if they were inspected. It cannot safely be said to be settled that the undertaking of a dealer selling to a consumer differs from that of an ordinary seller of goods.

Where a seller contracts to supply goods to be used for a particular purpose, and the circumstances are such that the buyer naturally relies upon the judgment or skill of the seller, there is an undertaking by the latter that they shall be or are reasonably adapted to this purpose. To raise this undertaking, the three necessary facts are: that the sale is for a particular purpose; that the seller's position was one of skill or knowledge superior to that of the buyer's; and that the buyer's position was such that he

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<sup>1</sup> *Burnby v. Bollett*, 16 M. & W. 645; *Emmerton v. Matthews*, 7 H. & N. 586; *Giroux v. Stedman*, 145 Mass. 439. But see *Hoover v. Peters*, 18 Mich. 51.

<sup>2</sup> *Hoover v. Peters*, 18 Mich. 51.

<sup>3</sup> *Julian v. Laubenberger*, 38 N. Y. Sup. 1052. See also *Weidman v. Keller*, 58 Ill. App. 382.

would naturally rely upon this superiority. It is only when these conditions exist that the frequently repeated statement is true that where goods are sold to be used for a particular purpose, there is an implied warranty that they are reasonably fit for the purpose.

It is purely a question of fact in any case whether the sale is for a particular purpose. The contract must have been made with direct reference to the intended use, if the latter is to be considered a material part of the contract. The use which is to be made of the goods, although considered by the buyer and seller, is frequently merely incidental. Where an article is ordered by description, the mere fact that the seller knew for what purpose the buyer intended to use it is not enough to require a finding that it was supplied for a particular purpose,<sup>1</sup> or possibly even to sustain such a finding.<sup>2</sup> The fact that the goods were ordered for the particular purpose strongly indicates that the purpose is a part of the contract.

The case occurring most frequently in which the seller's position is one of knowledge or skill superior to that of the buyer's is that in which he is a manufacturer. A seller who manufactures goods to order for a particular purpose, undertakes that they will not be unfit for the purpose through anything arising from the process of manufacture or discoverable therein.<sup>3</sup> This undertaking should not be held to extend to any unfitness which is due to defects in material which are not discoverable during that process.<sup>4</sup> This distinction has not been noticed in the cases generally, either to be denied or enforced, but should be maintained, as a manufacturer has no knowledge or skill superior to the buyer's, touching an unfitness of this kind. The chances are not against this view's being sustained.

Where the seller is the manufacturer and the goods, although not made to order, are not specific, he should be, and probably is, liable to the same extent that he is when they are made to order.<sup>5</sup> There is the same reason for the undertaking.

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<sup>1</sup> Jarecki Mfg. Co., Lim., v. Kerr, 30 Atl. (Pa.) 1019. See also *Shepherd v. Pybus*, 3 M. & Gr. 868.

<sup>2</sup> *Dounce v. Dow*, 64 N. Y. 411.

<sup>3</sup> *Randall v. Newson*, 2 Q. B. D. 102.

<sup>4</sup> *Bragg v. Morrill*, 49 Vt. 45; *contra*, *Jones v. Bright*, 5 Bing. 533. But *semble* *Dounce v. Dow*, 64 N. Y. 411.

<sup>5</sup> *Pease v. Sabin*, 38 Vt. 432; *Poland v. Miller*, 95 Ind. 387; *Downing v. Dearborn*, 77 Me. 457; *Zimmerman v. Druecker*, 44 N. E. R. (Ind.) 557.

Where the goods are specific, the undertaking should have the same scope.<sup>1</sup> The reason for it is just as strong in this instance as in the others. The buyer's natural reliance upon the manufacturer is the same. The manufacturer would probably be held generally to the same undertaking.

Although the case arising most frequently in which the seller occupies a position of knowledge or skill superior to that of the buyer's is where the seller is the manufacturer, yet he may occupy this position when he is merely a dealer. To the extent of this superiority he should be held to the same undertaking as a manufacturer. It is not certain that this view would be approved generally. Unless we are to regard the rule which holds a manufacturer to this undertaking as arbitrary, we should extend it to all persons who come within the reason for it. It is true that generally the seller who is a dealer merely occupies no position of advantage over the buyer, but this is not always true. Where a buyer orders goods by a general description for a particular purpose, he may place upon the seller the necessity of exercising a choice which he has no opportunity to exercise for himself. If the seller desires to act under these circumstances, he may properly be held to an undertaking that he has selected the proper kind of goods. The seller's undertaking in any case should not be held to extend to unfitness arising from defects of material or construction which are not discoverable after the goods are completed,<sup>2</sup> as his superiority to the buyer does not extend to these, but should be limited to inherent inadaptability. It has been held that a dealer who occupies such a position that the buyer naturally relies upon his skill or judgment undertakes that goods which he supplies for a particular purpose are reasonably fit for the purpose.<sup>3</sup> In these cases nothing is said relative to limiting the rule to inherent inadaptability, and it was not necessary to do so. As it is uncertain whether the rule holding dealers liable would be generally followed, so it is whether it would be limited as suggested. It is

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<sup>1</sup> *Beals v. Olmstead*, 24 Vt. 114; *Rose v. Meeks*, 59 N. W. R. (Ia.) 30; *Boothby v. Scales*, 27 Wis. 626; *Snow v. Shomacker Mfg. Co.*, 69 Ala. 111 (*dictum*). See also *Kellogg v. Hamilton*, 110 U. S. 108. But see *Sanborn v. Herring*, 6 Am. L. Reg. N. S. 457.

<sup>2</sup> *White v. Oakes*, 88 Me. 367; *Hight v. Bacon*, 126 Mass. 10.

<sup>3</sup> *White v. Gresham*, 52 Ill. App. 399; *Brown v. Edington*, 2 M. & G. 279; *Bigge v. Parkinson*, 7 H. & N. 955; *Jones v. Just*, L. R. 3 Q. B. 197 (*dictum*).



likewise uncertain whether a distinction would be made between specific and non-specific goods. None should be made.

The third requisite for this undertaking by the seller is that the buyer's position is such that he naturally relies upon the seller's superiority. Generally, where the buyer has an opportunity to inspect before purchasing, there is no undertaking by the seller covering any lack of fitness which is apparent on inspection.<sup>1</sup> By "apparent" is meant apparent to one of the buyer's skill. A manufacturer should be held to have undertaken that the goods are fit, although there is an inspection by the buyer and the unfitness is discoverable on inspection, provided it is not evident to one of the buyer's skill.<sup>2</sup> The fact that there was an inspection by the buyer should not affect the seller's undertaking covering any unfitness which is not discoverable on inspection.<sup>3</sup>

Where goods of a known, defined kind are ordered by a specific description, there is no undertaking by the seller that they shall be fit for any particular purpose, whether the seller is a manufacturer<sup>4</sup> or a dealer merely.<sup>5</sup> The fact that the buyer specifically describes the goods indicates that he is relying upon his own judgment. If, however, the other requisites for an undertaking of fitness by the seller are present, he should not be held to be relieved by the description by the buyer from liability for any inadaptability except that which arises from the conformity of the goods to the description. He should be held to undertake that the goods are fit for the particular purpose, except in the particulars in which their correspondence to the description makes that impossible. It is to the extent of the latter particulars only that the buyer has indicated that he relies upon his own judgment.

The combinations of circumstances which give rise to warranties and agreements of that nature are so varied that pages suffice to give merely a suggestion of their variety, and even chapters do them but scant justice. The decisions on the subject rest generally consistently upon the two reasons already suggested. One is

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<sup>1</sup> *Hight v. Bacon*, 126 Mass. 10 (*dictum*).

<sup>2</sup> *Boothby v. Scales*, 27 Wis. 626.

<sup>3</sup> *Jones v. Bright*, 5 Bing. 533; *Beals v. Olmstead*, 24 Vt. 114; *Pease v. Sabin*, 38 Vt. 432.

<sup>4</sup> *Chanter v. Hopkins*, 4 M. & W. 399; *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; *Jarecki Mfg. Co., Lim., v. Kerr*, 30 Atl. (Pa.) 1019; *J. T. Case Plow Works v. Niles & Scott Co.*, 63 N. W. R. (Wis.) 1013. See also *Cunningham v. Hall*, 4 Allen, 268.

<sup>5</sup> *Dounce v. Dow*, 64 N. Y. 411; *Jones v. Just*, L. R. 3 Q. B. 197 (*dictum*).

that a buyer who purchases goods which he has never had an opportunity to examine should be protected against those things which an examination would have revealed to him. The other is that a buyer who naturally relies on the representations or superior knowledge or skill of a seller should be protected to the extent of this natural reliance. If, in any case, neither reason for protecting the buyer exists, the rule by which it is decided is *caveat emptor*.

*Edward F. McClennen.*

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LORD COKE AND PINNELL'S CASE. — In your note upon Accord and Satisfaction, on page 193 of the current volume of the REVIEW, you suggest that, while a payment of a part of what is due cannot be a satisfaction of the entire debt, such partial payment may, nevertheless, be effectual as a consideration to support a promise by the creditor not to collect the residue; and that in accordance with this distinction the case of *Foakes v. Beer*, 9 App. Cas. 605, might have been decided the other way, without any impeachment of Coke's familiar *dictum* in *Pinnell's Case*. This distinction, so far as I have observed, has not been taken by any writer upon Contracts. But the legal acumen of the writer of your "Note" will be appreciated, when I add that this distinction was explicitly stated nearly three centuries ago, and by no less distinguished an authority than Lord Coke himself.

His words, as reported in *Bagge v. Slade*, 3 Bulst. 162, are as follows: "And if a man be bound to another by a bill in £1000 and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him the said bill of £1000, this £500 is no satisfaction of the £1000, but yet this is good and sufficient to make a good promise and upon a good consideration, because he hath paid money, *sc.* £500 and he hath no remedy for this again." The same case is found in 1 Roll. R. 354, where Coke is reported as saying: "Although this is not any satisfaction of the debt, still it is sufficient to ground an action on the case upon."

The meaning of this *dictum* is unmistakable. The creditor, notwithstanding the receipt of the £500, might still sue upon the bill and recover the other £500. But, if he should do so, he would have to refund the £500 as damages for breaking his contract to give up the bill. This cross action was the only mode by which, in Coke's time, the debtor could make use of the creditor's promise. To-day, of course, to prevent circuity of action, the debtor might plead the promise, if valid, as an



equitable plea. The validity of such a promise was denied in *Foakes v. Beer*; and it is one of the ironies of fate that the House of Lords unwittingly overruled the real opinion of Coke in *Bagge v. Slade* almost solely because they were not prepared to overrule his supposed opinion in *Pinnel's Case*.

*Bagge v. Slade* is also interesting on account of the point actually decided. The plaintiff and defendant were liable as co-sureties to A. In consideration that the plaintiff would pay A the entire debt, the defendant promised the plaintiff to reimburse him as to a moiety. The plaintiff paid the whole amount, but the defendant declined to keep his promise. To understand this case it must be remembered that the doctrine of contribution between co-sureties was not yet established, the Court of Common Pleas saying, when granting a prohibition against a bill for contribution in the Court of Requests in 1613, "If one surety should have contribution against the other, it would be a great cause of suit." It was necessary, therefore, to prove a valid express contract for reimbursement. The court in *Bagge v. Slade* sustained the contract, thus setting an early precedent for the modern cases. *Shadwell v. Shadwell*, 30 L. J. C. P. 145; *Scotson v. Pegg*, 6 H. & N. 295, and *Chichester v. Cobb*, 14 L. T. Rep. 433.

We have, therefore, this curious result of the English decisions. If a creditor promises a debtor something in consideration of the debtor's payment of his debt, the promise is not enforceable, because the debtor's performance of his legal duty is no consideration, not being a legal detriment. If, however, a third person promises the debtor something in consideration of the debtor's payment of his debt, the promise is valid, because the debtor's performance of his legal duty is a consideration, although not a legal detriment. It is a satisfaction to know that Lord Coke is in no way responsible for this antinomy. But it is unfortunate that *Bagge v. Slade* was not called to the attention of the House of Lords in the case of *Foakes v. Beer*; for in view of the declared reluctance of all the judges in that case to pronounce the creditor's promise invalid, it is possible, if not probable, that a knowledge of Lord Coke's real opinion might have led them to an opposite conclusion.

JAMES BARR AMES.

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"TRUSTS" WITHOUT BENEFICIARIES. — An erroneous decision in a court of law, unlike mistakes made in most professions or trades, never is at rest. The mischief is done not once and for all, but spreads like a contagious disease, affecting new matter and influencing the decision of other cases far removed in time and place from its origin. Especially is this true when such a decision is made by a judge whose opinions are entitled to the greatest respect. When Lord Eldon in the case of *Morice v. The Bishop of Durham*, 10 Ves. 521, held that a gift on trust for benevolent purposes was void because there was no *cestui* to enforce the trust, he could hardly have imagined what was to be the far-reaching and lamentable effect of the decision, and the tax it was to put on the ingenuity of judges and lawyers to prevent the extension of its principle. That case is securely established as law both in England and America; too securely, perhaps, to be done away with except by legislative aid. But its *ratio decidendi* has been discredited by the decisions of courts of both countries in cases differing in no wise from it in principle. Gifts on trust for example, for the purpose of erecting a tombstone, for maintain-

ing stables and kennels, and for the benefit of negro slaves, have been held valid. *Ames Cases on Trusts*, 201-204. The simple principle, believed to be legally sound, on which these later cases may be supported, is as follows. The donee takes subject to a moral obligation to carry out the testator's commands. There is no *cestui*, to be sure, and therefore properly speaking there is no trust; but if the donee is willing to act honestly, equity will not prevent him. If, however, he refuses to perform his moral duty and determines to enrich himself, the heirs or next of kin may properly ask a court of equity to declare the donee constructive trustee for them. There is a contingent constructive trust; and the beneficiaries under it, the heirs or next of kin, are presumably always ready to step forward and demand its enforcement in the contingency of the donee's not fulfilling his duty. (See an article on "The Failure of the 'Tilden Trust,'" 5 HARVARD LAW REVIEW, 389.) That the result secured by this reasoning is to be desired can hardly be questioned. Some courts have reached it by taking arbitrary distinctions, and in certain States statutes have been passed securing it.

A step in the other direction is the case of *McHugh v. McCole*, 78 N. W. Rep. 631 (Wis.). There the court refused to limit Lord Eldon's decision arbitrarily, and extended its principle to the case before them. They held a bequest on trust to pay for masses for the testator's soul void because there was no *cestui* to enforce it. Directly opposed to this case are *Reichenbach v. Quin*, 21 L. R. Ir. 138, and several American cases. *Shouler, Pet.*, 134 Mass. 426; *Seibert's App.*, 18 W. N. Cas. 276 (Pa.). The Wisconsin court acted logically if not wisely. They followed to its legitimate result a generally accepted decision, and *Morice v. The Bishop of Durham*, acting from a long distance, and through an interval of nearly a hundred years, accomplished a fresh injustice.

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SCIENTIFIC BOOKS AS EVIDENCE. — In the case of *Western Assurance Co. v. F. H. Mohlman Co.*, U. S. Circ. Court of App., Second Circ., Oct. 11, 1897 (not yet reported), the Court held admissible, in support of a professional opinion, statements as to strength of timber contained in scientific books of admitted authority. This is believed to be an entirely novel point, and the ruling made ought to attract considerable notice. Judge Lacombe, in delivering the opinion of the Court, puts the reason for admitting these statements in an admirable form. "Under the rule contended for [excluding these statements] this valuable information would be available for the use of a Court of Justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they had gathered would be lost to the Court, although available for every one else in the community. . . . We feel, therefore, no hesitancy in so modifying the general rule as to hold that where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which they are concerned."

This is a step rather in the face of many *dicta* to the contrary. Although no court has ever excluded such statements in books of this



character, there has always been manifested a great unwillingness to admit in evidence scientific books of any sort. The reasons given for their exclusion are that there is no opportunity for cross-examination, that such evidence lacks the sanctity of an oath, and that it is heresay. These very potent objections, however, may well be held to be counter-balanced by the very theory of expert evidence itself. The whole theory of the admission of expert evidence is that the jury are not able to come to an intelligent verdict because there are involved in the issue some questions "of science and art" on which they need instruction from some persons expert in such matters. In a case where the needed instruction is on the strength of timber, or a kindred subject, the experts themselves are mere mouthpieces for the text books and authorities furnished by various tests. The persons who have actually made the tests are often dead, and usually unobtainable, and the witnesses themselves have no personal knowledge on the subject. There is little or no question that the opinion of such witnesses is admissible, as they are engaged in an occupation calling every day for the solution of such problems. As a matter of practical necessity the courts are driven to admit the opinions of these architects, engineers, and builders. Such opinions being admissible, therefore, and being in large measure, if not entirely, based on statements in books on the subject, is it not unreasonable to admit the expert's opinion and exclude the statements on which such opinions are based? The question in such cases is a purely mechanical one, a question of fact, and thus differs from that where medical books, which may be said to deal rather with speculative opinion, are sought to be introduced. The books of mechanical tests seem more closely allied to annuity tables, life tables, almanacs, weather reports, and market reports, all of which have been held to be admissible, (*Vicksburg, etc. R. R. Co. v. Putnam*, 118 U. S. 545; *Munshower v. State*, 55 Md. 11; *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich. 489), than to medical books, which have been excluded in most jurisdictions.

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LIFE-TENANT A TRUSTEE FOR REMAINDER-MAN. — In the case of *Green v. Green*, 27 S. E. Rep. 952 (So. Car.), the Supreme Court of South Carolina has decided that where a tenant for life, who is under no obligation to insure, does insure her interest in the buildings, and they are subsequently burned, the insurance money is a fund held by her in trust, either to rebuild, or to take the interest for herself and leave the principal for the remainder-man. While the decisions upon this point are not unanimous, it would seem that the better reasoning is opposed to the view taken in this case. It is true that if there be a duty on the tenant to insure for the succeeding estate, or if without being under that duty he does so insure, and his act is subsequently ratified by the remainder-man, the money derived from the insurance must be devoted to rebuilding. *Welsh v. Ins. Co.*, 151 Pa. 607. To say, however, that in a case like the present there is a trust relation is a different matter. It may be questioned if the court were correct in its assumption that the relation of the tenant toward the property insured is that of a trustee. It is not denied that there are certain relations existing between the tenant and the remainder-man, such as the duty of the tenant not to suffer waste, which may be called fiduciary. These duties are, however, a part of the law of real property; they existed long before the doctrine of trusts arose;



and to attempt to base upon this common-law duty the relation of trustee and *cestui* seems hardly justifiable.

Granting, however, the assumption that the relation between the tenant and the remainder-man is, as regards the estate, that of trustee and *cestui*, it is still not clear how the conclusion reached here follows from the premise. The insurance money cannot be regarded as the product of the estate. It is simply the result of a contract made between the tenant and the insurer; and they alone are parties to it and have any interest in it. The money comes into the hands of the insured as a result of his foresight, and to reimburse him for a loss which he has suffered. To say that the fund derived from a contract made solely with reference to an interest of the tenant, — a fund, the entire amount of which will but suffice to make good the loss suffered by him in the destruction of his life interest, — is nevertheless to be held in trust for a party who was never contemplated or intended to be a beneficiary, seems to be not only an extreme extension of the doctrine of implied trusts, but a practical injustice to the tenant.

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THE POWER OF THE INTERSTATE COMMERCE COMMISSION. — The power of the Interstate Commerce Commission to regulate the rates charged by transportation companies has been the subject of many conflicting views. The matter has been vehemently debated by opponents of railroad combination, and is still under consideration in cases before the United States Supreme Court. One important question involved is whether the power conferred by the statute is limited to the regulation of existing rates, or whether it is active, and includes the right to compel railroad companies to adopt rates specified by the commission. In the case of *Cin., N. O. & T. P. R. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, the Court said that "if the commission . . . itself fixes a rate, that rate is prejudged by the commission to be reasonable." From this declaration an opinion started and gained ground that the commission could enforce a rate so determined. This opinion has been supported on the principle, stated in *State v. Fremont, C. & M. V. R. R. Co.*, 35 N. W. Rep. 118, 125 (Neb.), a case which deals with a similar commission formed under a Nebraska statute, that such a power is to be construed in relation to the end in view and the evil to be prevented. A broad construction is urged upon general grounds; in order that unjust discrimination may be effectually suppressed, it is argued as a matter of necessity that in the right to regulate rates the right to fix rates is included.

However plausible this argument in favor of a broad construction may be, — and in Nebraska it is to some extent justified by the State statute, — the Supreme Court of the United States refuses to apply the theory upon which the argument is based to the case of the Interstate Commerce Commission; and in taking this stand the court is right. The statement already quoted means no more than that when the commission has once fixed a rate, railroad companies may assume that the rate is reasonable; but from this it does not follow that the rate must be adopted by the companies, or even that a rate higher than that fixed may not be reasonable. The power of the commission, as is decided in *Interstate Commerce Commission v. Cin., N. O. & T. P. R. R. Co.*, 17 Sup. Ct. Rep. 896, affirmed in *Interstate Commerce Commission v. Alabama Midland R. R. Co.*, 18 Sup. Ct. Rep. 45, is partly executive and partly judicial, but in no respect legislative; in other words, it looks to the enforcement of

the law, not the creation of it. The statute from which the power is derived, as the court says, is virtually an authority to enforce the common-law rule that a carrier must not make unreasonable charges; this consideration furnishes no ground for attributing to this power a scope of which the common-law courts never dreamed. The strongest argument, perhaps, against the enlarged power contended for lies in the fact that the statute nowhere confers it. No legislative function can be inferred from a statute giving merely executive or judicial powers; such a function under the circumstances can arise only by express provision. In fact, if one were to draw any inference from the statute, that inference would be against a power on the part of the commission to fix rates; for by the statute the right to reduce or to increase rates in conformity with certain conditions is expressly given to the railroad companies themselves. A rational interpretation of the statute, therefore, in accordance with the analogy of the rule of common law, justifies the court when it decides that the power of the commission is to be narrowly construed, and that in publishing a schedule of rates and attempting to force railroad companies to adopt it, the commission has acted in excess of its authority.

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IS OUR CIVIL SERVICE ACT FUTILE?—In view of three recent decisions, widespread interest has been aroused in the question of the right of courts of equity to interfere in removals from office of public officials whose positions are embraced within the rules drawn up by the President to give effect to the Civil Service Act. On July 28, 1897, in the case of *Priddie v. Thompson*, 82 Fed. 186, the United States Circuit Court for West Virginia granted an injunction restraining a marshal from removing a deputy marshal from office, the main cause for such removal having been "political opinions or affiliations." On Sept. 14 and 15, 1897, in the cases of *Woods v. Gary* (see 25 Wash. L. R. 591) and *Carr v. Gordon*, 82 Fed. 373, the Supreme Court of the District of Columbia and the United States Circuit Court for Illinois refused to grant such an injunction on substantially the same facts as in the case above. It will be remembered that the Civil Service Act, passed in 1883, authorized the President, and a commission appointed by him, to prepare rules to carry the act into effect, such rules to provide, among other things, that no officer should be removed for refusal to contribute for partisan objects. Among the rules thus drawn up by the President was one forbidding dismissal from the executive civil service of any one for "political or religious opinions or affiliations." This was followed in a later administration by an amendment requiring that full notice and opportunity of defence be given to the officer to be removed. Upon this rule, or its amendment, the plaintiffs in the three cases cited based their right. Jackson, J., in *Priddie v. Thompson*, *supra*, said that such rules are part of the law of the land; that the object of the act is to restrain removal from office, otherwise it is futile; and that the plaintiff having a vested right in the office the court would grant an injunction to protect such interest. The courts in *Woods v. Gary* and *Carr v. Gordon*, on the other hand, maintained that the rules thus drawn up by the President are for the regulation of executive officers, but are not a part of the law; and that the plaintiff acquired no vested right to hold office by virtue of these executive regulations.

The view taken in these two later cases would seem to be the sounder



one. The President made the rules, and he may at his pleasure rescind them. He may draw up such rules for the regulation and discipline of his public officers, but to call the rules, though authorized by Congress, a part of the law of our land, would appear to be giving the executive more than his constitutional powers and infringing on the rights of the legislature. If it be said that the act would then be stripped of its purpose, it may be answered that the purpose of the act is found in its express provisions, namely, the establishment of competitive examinations and the forbidding of removals for refusal to contribute for partisan objects. The fact that only removal for such cause was prohibited would seem to show that Congress, wisely or not, intended to leave removals for other causes to the regulation and discretion of the executive, the principle of *expressio unius est exclusio alterius* applying.

CRITICISM OF JUDGE NO CONTEMPT OF COURT. — An instructive instance of the way in which the courts of this country have sometimes been obliged to depart from the common law of England, simply on the ground that it is inconsistent with the spirit of our institutions, is found in the case of *State v. Circuit Court of Eau Claire County et al.*, 72 N. W. Rep. 173 (Wis.). The facts of this case, which was an application for a writ of prohibition to restrain a lower court from punishing an alleged contempt, were of a very unusual character. Articles were published in a newspaper criticising the conduct of a judge who was then a candidate for re-election to his office, and accusing him of partiality and corruption, though not with regard to any particular case then pending. This judge thereupon had the author of the article and the publisher of the newspaper brought before him on a charge of contempt of court. On the application for the prohibition the question to be decided was whether the judge had power to punish as a contempt the publication of such articles, supposing them to be proved libelous. The Supreme Court of Wisconsin held that he had no such power; and in so doing followed the current of authority in this country. In England it has always been said that the publication of any libel upon a judge of the superior courts in the conduct of his office was a contempt of court, as tending to bring the administration of justice into disrepute, and might be summarily punished as such. The power thus lodged in the English courts, however, has very seldom been used, except in instances where the attack has been upon the conduct of the court in some case then before it, in which instance there is an evident attempt to improperly influence judicial action. It has been held, moreover, that this power to punish for any disrespectful comment belongs only to the superior courts, which are invested with a peculiar and time-honored sanctity, as direct representatives of the Sovereign's Majesty, and not to inferior courts of record, although the latter do possess the ordinary powers of punishing for contempt which are necessary for their protection in the discharge of their functions.

In this country, the courts have not been backward in asserting their inherent and necessary power, without the aid of legislatures, or even in spite of attempted interference on their part, to punish summarily for contempt; and the publication of articles reflecting on the conduct of judges or officers of the court in a pending suit has generally been held to amount to contempt. In a few cases the power has been asserted as broadly as in England, but for the most part, when the point has arisen, it has been held that the courts have no power to punish as con-



tempts the publication of criticisms of the conduct of a judge, such as were those in the Wisconsin case. The protection expressly extended to freedom of speech and of the press in the constitutions of all our States, as well as in that of the United States, though it could not operate to cut down the power to punish for contempt so far as that is necessary to the courts for their self-defence, yet seems to render it improper for them to proceed summarily to silence criticism of their conduct, except where such action is thus necessary. Where the criticisms are with regard to past transactions, it would seem that there is no interference with the present administration of justice, and that the persons attacked ought to be left to their action of libel. The very fact that such a case as that of the Wisconsin judge could arise shows the danger of any other rule.

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ATTACHMENT OF A SCHOLARSHIP. — The question of what forms of property may be taken in execution of a judgment has been presented in a new form in the recent case of *Cleveland National Bank v. Morrow*, 42 S. W. Rep. 200 (Tenn.). A perpetual scholarship had been conferred upon the defendant by vote of the corporation of a college. The defendant had been a benefactor of the college; and in acknowledgment of his favors the college gave him the right to keep one scholar appointed by him at the institution to enjoy gratuitously all its advantages. This scholarship was attached under a decree in equity, and sold by a master in chancery for the benefit of the creditors of the defendant; and the question arises whether this attachment should have been permitted. No direct authority, strangely enough, is to be found upon the point. The question, however, is important, and may have a wide application; for if the attachment is to be allowed in this case, similar rights, as for instance the right to appoint a patient to a free bed in a hospital, would also become subject to transfer in this summary manner.

The Supreme Court of Tennessee decided that the attachment in question was improper; and principle and policy support this view. What cannot be assigned, obviously cannot be taken in execution; and no right dependent upon the personal character of the holder can be assigned. For this reason a power of appointment to charitable uses under a will cannot be assigned; for its exercise demands an effort of judgment on the part of one particular person. *Doyley v. Attorney-General*, 4 Vin. Abr. 485. In applying the principle to the present case it is unnecessary to decide the exact nature of the college's liability. Whether the obligation be looked upon as a binding agreement on the part of the college, a revocable offer, or a gratuitous promise, the right or privilege conferred is in any case inseparably joined with the personal characteristics of the person intended to make use of it. So long as it lives in him he can no more transfer it to another than he can transfer his own mind. The college conferred the power upon him in reliance upon his personal judgment in making the appointment. No proposal was made for taking a scholar not designated by this one particular person; and gross injustice might be done if the college were forced to accept the choice of another person who may have nothing to recommend his judgment apart from the fact that he is a creditor of him who was first intended to exercise the power. The conclusion is inevitable, that the privilege of appointment under this scholarship is a personal matter, not assignable, and hence not properly subject to attachment.

A NOVEL ADMIRALTY QUESTION. — In *North American Commercial Company v. United States*, 81 Fed. Rep. 748, the United States Circuit Court has lately passed upon a novel and interesting question in maritime law. A schooner had been forfeited to the United States for an infringement of the act of Congress of April 6, 1894, prohibiting the killing of fur seals within sixty miles of the Pribilof Islands, and the question was whether this forfeiture should defeat a maritime lien for necessities furnished in good faith in a foreign port prior to the illegal act. The maritime lien was given priority, the court proceeding upon the ground that such a lien is created to enable the vessel to reach her destination, and that it "would seriously impair the power of her master to procure supplies in a foreign port upon her credit if the material-man is to hold his lien subject to . . . forfeiture." There is apparently no previous authority upon the precise question decided in this case. *The Florenzo*, Blatch. & H. 52, which was relied upon by the court, can hardly be regarded as establishing the proposition, for it is not clear from the statement of facts whether the lien there arose before or after the illegal act causing forfeiture.

If the illegal act causing forfeiture creates a maritime lien, it is certainly difficult to see why the present decision is not inconsistent with the general rule of admiralty that the last lien has the preference. While no authority has been found for the proposition that the government has in reality a lien, this view is certainly strengthened by the fact that a maritime lien arising after an illegal act is given priority over the forfeiture. Furthermore, the decree of forfeiture relates back to the time of the illegal act, thus complying with the legal notion that a "maritime lien arises the moment the event which occurs creates it." Moreover, while priority cannot be given to the government as a lienor on the usual ground that the last lienor should be preferred because he has protected the prior liens by enabling the vessel to proceed on its journey, this is not, it is submitted, a fatal objection. The party who secures a maritime lien for damage by collision can in no sense be regarded as helping the vessel to reach its destination, yet surely such a lienor would have priority under the proper circumstances.

A difference of opinion seems to exist as to whether there is any distinction between a maritime lien and a right to a proceeding *in rem*. If there be no distinction, unquestionably the illegal act in the present case created a lien, for it gave rise to a proceeding *in rem* instituted by the government. Even, however, if there exist a difference, and the government has merely a right to a proceeding *in rem*, as distinguished from a true maritime lien, it is believed that the government should still have precedence. Certainly a strong analogy is furnished in the established rule that capture as prize of war overrides all previous liens. It is conceived, also, that were priority given to the government, masters in foreign ports would not experience the difficulties anticipated by the court in the case under discussion. Material-men would, of course, take into account the remote possibility of forfeiture, just as they do now the greater chances of being postponed to the ordinary maritime liens arising from the exigencies of the voyage, and they would unquestionably so regulate their prices as to cover the expense of insuring against this slight additional risk; but this clearly would not seriously interfere with the securing of supplies.



ONE OF THE TRIALS OF TRUSTEES. — Of all the perplexities that beset a trustee, one of the most serious is caused by the difficulty of ascertaining, under various circumstances that frequently arise, the rights of life-tenant and remainder-man in property consisting of corporate stock. Two very recent cases in New York, *McLouth v. Hunt* and *Matter of Rogers* (reported in the New York Law Journal, Nov. 29th and Dec. 8th), by no means tend to lessen this difficulty. The former case decides that stock dividends out of earnings accumulated during the time of a life tenant are income, and should go to him as such. The latter case decides, in brief, that on a distribution of the property of a corporation at its dissolution everything that represents earnings accumulated during the time of the life-tenant should go to him. The first case follows the current of recent American authority, which breaks in upon the older and admittedly more convenient rule, followed in England, the United States Supreme Court, and Massachusetts, that cash dividends go to the life-tenant and stock-dividends to the remainder man. The latter case is on a point as to which there is little authority, but like the former it goes as far as possible in favoring the life-tenant. Even laying aside questions of convenience, which may properly, however, be given great weight in the determination of such matters, it may be questioned in point of principle whether these decisions arrive at a result in accordance with the intent of the creator of the trust or with substantial justice. But to compare the Massachusetts rule as to stock dividends with what may now be called the New York rule would require much space. Those questions, moreover, which would arise on the distribution of corporate property at dissolution might require the application of quite different principles. The whole subject of the rights of tenant and remainder-man in stock is peculiarly complicated by the immense possible variety of material circumstances.

In dealing with going companies only, an enormous number of states of fact may arise, each differing materially from any other. To consider some concrete cases will discourage dogmatic statements on the subject. The Boston & Albany Railroad has constantly put a large part of its earnings into permanent improvements, without increasing its nominal capital. Substantially, the action of the corporation is just the same as if this nominal capital were increased; the injustice suffered by the life-tenant, according to the New York view, is precisely as great in the former case as in the latter. Yet the New York courts, which profess to entirely disregard the form of the corporation's action, would certainly not make any attempt to help a life-tenant of this stock. On the other hand, when a Massachusetts corporation divided among its shareholders a sum of money which it had received as compensation for a part of its real estate taken by eminent domain, the Massachusetts court held that this dividend, though in cash, was capital, and went to the remainder-man. And lastly, a question on which there is no authority may be suggested. When the Old Colony Railroad leased its property for a long term to the New York, New Haven & Hartford Railroad for a guaranteed dividend of ten per cent, and a heavy cash bonus, which was immediately distributed, how ought a careful trustee, in Massachusetts or elsewhere, to have divided this bonus?



## RECENT CASES.

**AGENCY — APPOINTMENT BY INFANT — RATIFICATION.** — *Held*, that the appointment of an agent by a minor, and a contract made by the agent under his appointment, are not void, but may be ratified by the principal on coming of age. *Coursolle v. Weyerhaeuser*, 72 N. W. Rep. 697 (Minn.).

The case is important as adding one more to a small but growing list of cases in which an infant's appointment of an ordinary agent is held merely voidable. *Whitney v. Dutch*, 14 Mass. 461; *Hardy v. Waters*, 38 Me. 450; *Pyle v. Craven*, 4 Littell, 17; *Hastings v. Dollarhide*, 24 Cal. 195. As the court frankly admits, nearly all the text-writers and a great many *dicta* in the cases state that an infant's appointment of an agent is entirely nugatory. This view apparently arose from a misconception of the old cases as to a power of attorney by an infant to appear and confess judgment, cases explicable as turning on a question of court procedure. Considering that this doctrine has obtained so long, it is remarkable that it seems to have been applied in almost no cases of ordinary agency, and in very few of a power of attorney under seal. *Lawrence v. McArter*, 10 Ohio, 37. The way, then, is fairly open to adopt a sounder view and to sweep away an illogical exception to the general rule now prevailing, that an infant's acts are not wholly void, but voidable at his option.

**AGENCY — FELLOW-SERVANTS — PASSENGERS.** — Plaintiff's husband was employed by defendant to repair a bridge, under a contract stipulating for free transportation over defendant's railroad between his home and his place of labor. While returning from his work, he was killed in a collision caused by the negligence of other servants of defendant. *Held*, at the time of the accident plaintiff's husband was not an employee, but a passenger. *McNulty v. Pa. R. R. Co.*, 38 Atl. Rep. 524 (Pa.).

*O'Donnell v. Allegheny Valley R. R. Co.*, 59 Pa. St. 239, is precisely in point, and was expressly followed. Outside of Pennsylvania, however, what authority there is seems to be the other way. *Gilshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267. Nevertheless, it is submitted that the Pennsylvania view is preferable. The servant is doubtless carried because of his employment, but hardly as a part of it. He is at liberty to use any other method of transportation; and, indeed, the carriage may well be treated as part of the consideration paid for his services. The court very properly distinguished *Tanney v. Midland Ry. Co.*, L. R. 1 C. P. 291, and *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384, in which cases it was part of the employee's duty to travel in a construction train to such parts of the roadbed as might require repairing.

**AGENCY — LIABILITY OF PRINCIPAL — FRAUD.** — *Held*, that an action of deceit for fraud in the sale of land to plaintiff by defendant, through her agent, on the ground that false representations were made by the agent as to the quantity of the land, cannot be maintained, where the evidence fails to show that defendant knew of the representations. *Keefe v. Sholl*, 37 Atl. Rep. 116 (Pa.).

The case is contrary to the weight of authority and opposed to the principles of agency. Mechem on Agency, § 743. It is true, as a general proposition, that an action of deceit cannot be brought against one personally innocent of fraud. But the law of agency fixes upon the principal the responsibility for many acts of the agent which were not only unauthorized but even expressly prohibited. *Philadelphia & Reading Ry. Co. v. Derby*, 14 How. 468. The only question is whether the agent was acting within the scope of his authority. If he was, the law declares that the act of the agent is the act of the principal, and holds the latter liable civilly. It is hard to see how a distinction can properly be drawn between fraud and any other wrong. *Barwick v. Joint Stock Bank*, L. R. 2 Ex. 259. It is to be noticed that this is not like the case of *Cornfoot v. Fouke*, 6 M. & W. 358, where it was rightly held that an innocent representation by the agent could not be tacked to the guilty knowledge of the principal, so as to hold the latter liable in an action of deceit.

**BILLS AND NOTES — AGENCY — UNDISCLOSED PRINCIPAL.** — *Held*, that an undisclosed principal could sue in his own name on a note payable to his agent without alleging a transfer of the note to him by the agent. *McConnell v. East Point Land Co.*, 28 S. E. Rep. 80 (Ga.).

This decision is certainly not warranted by authority. The court states that the doctrine which allows an undisclosed principal to sue in his own name on contracts made in the name of his agent, applies to all contracts. The opinion overlooks the fact that the doctrine is generally held not to extend to sealed instruments and negotiable paper.

As a decision in the law of bills and notes the case is very unsatisfactory, as it breaks in upon the rule that the rights and liabilities attaching to a negotiable instrument should appear on its face. 1 Dan. Neg. Ins., 4th ed., § 303; 2 Ames's Cas. on Bills and Notes, 550, note 1, 558, note 1.

**CONSTITUTIONAL LAW — CLASS LEGISLATION — UNJUST DISCRIMINATION.** — *Held*, that a Pennsylvania statute imposing upon every employer of foreign-born, unnaturalized, male persons over twenty-one years of age, a tax of three cents a day for each day that every such person may be employed, and authorizing the deduction of that sum from the wages of the employee, is in violation of the Fourteenth Amendment. *Fraser v. McConway & Torley Co.*, 82 Fed. Rep. 257.

*Held*, that an act requiring persons peddling in a certain county to take out a local license, but exempting merchants, pedlars who sell to merchants, and citizens who sell the products of their own growth and manufacture, is in violation of the Fourteenth Amendment. *Comm. v. Snyder*, 38 Atl. Rep. 356 (Pa.).

Legislation which is directed towards a class is not for that reason unconstitutional. But it must have a just and reasonable basis; it must not provide for a mere capricious selection. *Barbier v. Connolly*, 113 U. S. 27; *Yick Wo v. Hopkins*, 118 U. S. 356. In both the cases under consideration the court failed to find a reasonable basis, and both decisions seem proper. It is, perhaps, conceivable that a condition of affairs might arise in a State requiring such legislative regulations for the public welfare. Under such circumstances the question is one of the greatest delicacy. The determination of the existence of the exigency is primarily a legislative matter. If the court could not find that the legislature had acted unreasonably, the legislation should be sustained. *Powell v. Pennsylvania*, 127 U. S. 678. But where, as here, the court is satisfied that the legislature has acted arbitrarily, there is unjust discrimination, and the Fourteenth Amendment applies.

**CONSTITUTIONAL LAW — RAILWAY RATES — REVIEW BY COURTS.** — A statute provided for a railroad commission to regulate rates in the State. *Held*, that the fixing of rates is a legislative or administrative act, not a judicial one. The court can review the acts of the commission only so far as to determine whether the rates fixed by it are confiscatory. *Steenerson v. Great Northern Ry. Co.*, 72 N. W. Rep. 713 (Minn.).

The question presented by this case has given rise to much diversity of opinion. Where the reasonableness of rates has been passed upon by the legislature, the Supreme Court of the United States has held that it cannot review the question. *Budd v. New York*, 143 U. S. 517. The same court has held that where the rates have been determined by a commission its decision is reviewable. *Chicago Railway Co. v. Minnesota*, 134 U. S. 418. It would seem that a distinction between rates settled by the legislature and those settled by a commission is untenable. What the legislature can do itself it can confer power on its duly authorized commission to do. Granting this, it is still necessary to bear in mind that there are in these cases two distinct inquiries, — one as to the reasonableness of the rates, the other as to the reasonableness of the action of the legislature. The former is not within the scope of the judiciary, the latter is. If the legislature has acted unjustly and capriciously, it has acted outside its jurisdiction. But within its jurisdiction its decision is final. The court cannot impose its personal standard upon the legislature. The function of the court in this connection may well be compared to that of the judge in revising the verdict of the jury. 1 Thayer's Cas. on Const. Law, 672, note.

**CONTEMPT OF COURT — CRITICISM OF JUDGE.** — The publication of newspaper articles reflecting on the character of a judge, without reference to any pending case, cannot be punished as a contempt of court. *State v. Circuit Court of Eau Claire County*, 72 N. W. Rep. 173 (Wis.). See NOTES.

**CRIMINAL LAW — SPECIFIC INTENT — INTOXICATION.** — *Held*, that intoxication, to reduce the crime of murder from the first to the second degree, must be such as to paralyze the faculties of the defendant and render him incapable of forming an intent to kill, and not merely such as to satisfy the jury that the intention did not in fact exist. *Wilson v. State*, 37 Atl. Rep. 954 (N. J.). Dissenting opinion, 38 Atl. Rep. 428.

The reasoning of the majority is founded upon a misconception of the law in cases of intoxication. The court correctly assumes that intoxication is not a defence in itself, but, probably for fear of opening too large a field for fraudulent defences, it fails to recognize the distinction between offences which require a specific intent and those which do not. Murder in the first degree is a wilful, deliberate, and premeditated killing; if, therefore, for any reason whatever, the specific intent to kill does not exist, the crime is not committed. The decision is supported by some loose language in the books. In *Warner v. State*, 56 N. J. Law, 86, the authority chiefly relied on, the



question is not involved, and where the point has come up squarely the courts have generally decided in accordance with the opinion of the dissenting judge. See *Haile v. State*, 11 Humph. 154.

**DAMAGES — CONTRACTS — QUANTUM MERUIT.** — The plaintiff, after part performance, was wrongfully prevented by the defendant from completing his contract. In a suit upon a *quantum meruit* it was held that the plaintiff might recover the fair and reasonable value of what he had done, without reference to the compensation fixed by the contract. *Thompson v. Gaffey*, 72 N. W. Rep. 314 (Neb.).

The weight of authority is probably in favor of this case. The basis of the doctrine is that the plaintiff should be allowed to recover that which he has advanced in the sole expectation of performance by the defendant. *Derby v. Johnson*, 21 Vt. 17; Keener on Quasi-Contracts, 293. On this view logical consistency would demand that the reasonable value of the part performed should be the measure of damages, even if it exceeded the contract price for the whole; but no court has gone so far. The doctrine of the principal case may, however, be open to doubt. The only question is as to the compensation, and where the parties have fixed a rate by agreement the law should not imply a different one. This is especially true as the plaintiff has the option of declaring on his express contract and recovering any prospective profits. See *Doolittle v. McCullough*, 12 Ohio St. 360.

**EQUITY — BILL TO GET POSSESSION OF LAND.** — Held, that a claimant under a homestead entry who has obtained his final certificate from the Land Department may not maintain a bill in equity to get possession of the land. *Laughlin v. Fariss*, 50 Pac. Rep. 254 (Okl.).

In the case of *Barnes v. Newton*, 48 Pac. Rep. 190 (Okl.), the Land Department had decided in favor of the plaintiff's entry, but he had not yet received his final certificate or begun residence on the land. The equity court took jurisdiction to give the plaintiff possession, on the ground that his remedy at law was too slow. As the United States statute requires a homestead entryman to begin residence on the land within six months of the date of his entry, a speedy remedy is especially desirable for him. Yet it may be doubted, as suggested in 11 HARVARD LAW REVIEW, 268, whether equitable interference is expedient even in that case, and the court is clearly wise in refusing to extend its jurisdiction to the principal case.

**EQUITY — CIVIL SERVICE ACT — REMOVAL FROM OFFICE.** — Held, that the rules which Congress authorizes the President to draw up to give effect to the Civil Service Act are simply executive regulations, without the force of law; and that therefore a court of equity cannot interfere in the removal of an official embraced under such rules. *Carr v. Gordon*, 82 Fed. Rep. 373. But *contra*, *Priddie v. Thompson*, 82 Fed. Rep. 186. See NOTES.

**EQUITY — PARDON OF ACCUSED AFTER FORFEITURE OF BAIL BOND.** — Held, that pardon of the accused after forfeiture of his bond does not relieve his sureties from liability. *Dale v. Commonwealth*, 42 S. W. Rep. 93 (Ky.).

This precise question is here raised for the first time in Kentucky. What little authority there is on the point is in accord. The legal liability of the so-called surety, who is in fact a principal debtor, is fixed by the forfeiture. The only question is whether the subsequent pardon gives ground for relief in equity. Admitting even that there would be none in case the obligee were an individual, the argument can be suggested that, where the obligee is the sovereign, he should not seek to enforce through his courts a civil liability connected with an offence which he has pardoned. But no sound distinction in this respect between the sovereign and an individual can well be drawn. The pardon relieves only against the penalties of the offence. Even to prevent hardship, equity cannot interfere with the enforcement of an established legal right, where no fault can be imputed to its possessor. See *Weatherwax v. State*, 17 Kan. 428; *State v. Davidson*, 20 Mo. 212.

**EVIDENCE — INTENTION.** — On a trial for murder, the prosecution had given evidence that the defendant had intended to flee from the State, after being informed of the death of the person for whose murder he was indicted. To rebut this, he offered in evidence a letter written by him explaining his intended departure. Held, it was inadmissible. *State v. Carrington*, 50 Pac. Rep. 526 (Utah).

The court failed to notice the rule laid down in *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, and *Railway Co. v. Herrick*, 49 Ohio St. 25, that intention, if material, can be proved by contemporaneous declarations. But to have brought the letter within this rule, it must first have been shown that it was not manufactured evidence. The circumstances of the writing of the letter were sufficiently suspicious to warrant the conclusion that it was for a self-serving purpose. On this view of the facts the decision is clearly correct.



**EVIDENCE—RES GESTA.**—In an action against a railroad company for causing the death of A, defendant tried to prove that A was stealing a ride on the train and fell off between the cars. To rebut this and to show that A was walking along the track at the time of the accident, plaintiff offered evidence that A had been kicked and shoved off another of defendant's trains which had preceded, by about an hour, the one by which A had been killed. *Held*, the trial court properly admitted this evidence as part of the *res gesta*. "It is all a part of the history of the case." *Knoxville, etc. R. R. Co. v. Wyrick*, 42 S. W. Rep. 434 (Tenn.).

The case illustrates the great confusion in some courts as to the doctrine of *res gesta*. Properly (except in certain cases of agency, bankruptcy, and rape) it is an exception to the rule against hearsay, by which are admitted declarations accompanying acts which are in themselves admissible. *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274. The present case is not one of hearsay at all. But the language of the court is even looser than the usual way of stating the scope of the doctrine. There is a reasonable limit to the phrase, "a part of the surrounding circumstances;" but the phrase, "a part of the history of the case," would do away with the whole rule against hearsay, for the evidence most objectionable on that score is, if material, a part of such history. The result, however, seems right. The real objection to the evidence is the lack of probative value. But the trial judge has, in the exercise of his discretion, admitted the evidence, and his decision should not be disturbed, except upon clearer proof of abuse of discretion than is here shown. *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332.

**EVIDENCE—SCIENTIFIC BOOKS—EXPERTS.**—A witness may read in evidence excerpts from scientific books in support of his professional opinion. *Western Assurance Co. v. The J. H. Mohlman Co.*, U. S. Circuit Court of Appeals, Second Circuit, Oct. 11, 1897 (not yet reported). See NOTES.

**INSURANCE—TERMOR A TRUSTEE.**—*Held*, insurance money collected by a tenant for life is held by him in trust either to rebuild or to enjoy the interest for his life and leave the principal for the remainder-man. *Green v. Green*, 27 S. E. Rep. 952 (S. C.). See NOTES.

**INTERNATIONAL LAW—CHANGE OF SOVEREIGNTY—PRIVATE RIGHTS.**—*Held*, that the law in New Mexico, determining the rights of property between husband and wife, is the law of Mexico as it was in force at the time when the territory was acquired by the United States. *Barnett v. Barnett*, 50 Pac. Rep. 337 (N. M.).

Law is territorial, and is changed, not by a mere change of sovereignty, but by act of the sovereign. When territory is ceded, the ceding sovereign may change the law at the time of transfer, *U. S. v. Kinkaid*, 150 U. S. 483; or the new sovereign may change it by statute. But until a change is made the former law remains in force, except in so far as it is in conflict with the political character, institutions, and constitution of the new sovereign. *Chicago & Pacific R. R. Co. v. McGlinn*, 114 U. S. 542; *U. S. v. Percheman*, 7 Pet. 82.

**MORTGAGES—RIGHT TO PURCHASE TAX TITLE.**—Where a mortgagor sought to compel a reconveyance of the premises, *held*, that the mortgagee could set up a tax title based on tax sales made before he went into possession, which title had been conveyed to him. *McLaughlin v. Acom*, 50 Pac. Rep. 441 (Kan.).

The decision follows the weight of American authority. In England a tax title is unknown. See Jones on Mortgages, § 713, and cases cited. In them the following distinction is made: A mortgagee, if not in possession, is under no duty to pay taxes, and has the same right as a stranger to purchase a title based on them. If, however, he has taken possession he is under a duty to pay taxes, and hence cannot set up a title acquired under a sale made because of his default. For reimbursement he is given a lien in addition to the lien for his mortgage debt. But in *Maxfield v. Willey*, 46 Mich. 252, Cooley, J., allowed the mortgagor to treat such a title acquired by the mortgagee as valid or not at his option, on the principle that "neither party to a mortgage can, against the will of the other, buy at a tax sale and cut off the other's interest." This would seem the better doctrine. A mortgagee, whether by the mortgage he gets legal title or only a lien, is a fiduciary under obligation to return the security on payment of the debt. He cannot, therefore, compete with the mortgagor, and should not be permitted to put himself in a position where he can refuse to carry out his obligation.

**PERSONS—CUSTODY OF CHILD.**—In a *habeas corpus* proceeding to obtain the custody of an infant from its father, it appeared that the child's mother was dead and the father was morally unfit to have charge of it. The applicant for the writ was not a relative, but had cared for the child for several years, and desired to keep it. *Held*, the writ would not be quashed. *Schleuter v. Cunasty*, 47 N. E. Rep. 825 (Ind.).

This case represents the modern law in regard to the custody of children. In England, at common law, the father's right was paramount and practically absolute. *Rex v. De Manneville*, 5 East, 221; *Rex v. Greenhill*, 4 A. & E. 624. Such great injustice frequently resulted from the application of the common-law doctrine, that it has been much modified by statute. See 36 & 37 Vict., c. 66. In America, even in the absence of statutes, the father has no absolute right to the custody of his child. He is *prima facie* entitled to the custody, but is in a fiduciary relation to the child, analogous to that of a trustee to the *cestui*. If he is unfit to perform the trust, and the welfare of the infant demands it, courts may, in their discretion, bestow the custody upon another. Hochheimer, *Custody of Infants*, 2d ed., sec. 40.

PRACTICE—DISCOVERY—"FISHING."—In a proceeding to quiet title to certain premises, defendants, who claimed to be owners thereof, were ordered, on interrogatories being filed for discovery, to produce everything which might tend to show that they were not owners to the extent which they claimed. Counsel for defendants stated that this would necessitate a search lasting about nine months, and extending through hundreds of years. The order was affirmed on appeal. *Attorney-General v. Newcastle-upon-Tyne Corporation* [1897] 2 Q. B. 384.

Discovery is now generally obtained by statutory interrogatories instead of a bill in equity; but this is merely a change in procedure. 1 Pom. Eq. Jur., 2d ed., § 209. The principal case allows "fishing" with serious consequences to the defendants. It follows the general English practice, however. See Wils. Jud. Acts, 6th ed., 251-268. For an explanation of the misconceptions from which this practice developed, see Langdell, *Eq. Pl.*, 2d ed., 252-258. It is unsafe to generalize as to the American practice; but in New York (1 Barb. Ch. Pr. 101, note 3) and Massachusetts (*Wilson v. Webber*, 2 Gray, 558; *Davis v. Mills*, 163 Mass. 481), the practice appears to be more satisfactory. On principle a party is entitled to discovery in answer to specific affirmative charges and specific interrogatories as to matters relevant to the support of an affirmative or negative case. Even when the rule is clear as to the right to discovery, there is great difficulty in applying it. That the charges should be affirmative and specific is especially necessary to prevent "fishing," when discovery is sought in support of a negative case. The practice in regard to these matters depends mainly on the common sense of the individual judges.

PROPERTY—ATTACHMENT OF A SCHOLARSHIP.—A college conferred upon the defendant a perpetual scholarship entitling him to keep one scholar appointed by him at the institution. *Held*, that the right so conferred could not be attached and sold in execution of a judgment. *Cleveland National Bank v. Morrow*, 42 S. W. Rep. 200 (Tenn.). See NOTES.

PROPERTY—RIPARIAN RIGHTS—IMPROVEMENT BY STATE—COMPENSATION.—The city of New York, under authority from the State, built on the foreshore, owned by the State, an embankment, whereby it deprived the plaintiff, a riparian owner, of his riparian rights. *Held*, that he was entitled to no compensation, since the embankment was for the benefit of commerce and navigation. *Sage v. Mayor of New York*, 47 N. E. Rep. 1096 (N. Y.).

After a full review of the authorities, the court decides that, by the law of New York, ownership of property on navigable tide-waters is subject to a right impliedly reserved in the State to improve the water front for the benefit of commerce and navigation, without compensation to the owner. *Lansing v. Smith*, 9 Wend. 4; *Furman v. City of New York*, 5 Sandf. 16; s. c. 10 N. Y. 567; *Towle v. Remsen*, 70 N. Y. 303. If the improvement is for any other purpose, as for a railroad, there is no such implied reservation, and the owner is entitled to compensation. *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79. If it is once admitted that riparian rights are property (*Yates v. Milwaukee*, 10 Wall. 497; *Buckleigh v. Board of Works*, L. R. 5 H. L. 418), this is the only possible ground on which to rest the New York rule. A similar limitation on complete ownership is found in *Peart v. Meeker*, 45 La. Ann. 421, and *Philadelphia v. Scott*, 81 Pa. St. 80.

PROPERTY—TITLE BY ESTOPPEL.—A, B, and C each owned one undivided third of a certain lot. A gave a deed, purporting to convey the premises to B, with warranty against all claims under the grantor. Later A acquired one-half of C's interest and deeded this to D. *Held*, that D was entitled to one-sixth of the lot as against B. *Bennett v. Davis*, 38 Atl. Rep. 372 (Me.).

The doctrine of the case is that a warranty in a deed against all claims under the grantor, where no intent is shown to transfer title to be acquired *in futuro*, relates only to claims originated by the grantor himself. Therefore he may later obtain an interest not created by himself and hold it against his grantee. Such was the interest in ques-



tion here, and hence there would be no estoppel even against A himself. This is probably good law and generally accepted. The case might, however, have been put on the ground that D, as a purchaser for value without notice, would not be affected by any estoppel, though good against A. The court seems to admit that this view is right on principle, though repudiated in several Maine cases. Whether this is sound law or not has been much disputed. Two questions are involved, — whether under the registry acts a grantee has constructive notice of a deed made by his grantor before receiving the title under which the grantee claims; and whether, if he has not, the doctrine of estoppel, really a fiction, is to prevail over the spirit of the registry laws. *Rawle on Covenants*, 5th ed., § 259 *et seq.*; *Bigelow on Estoppel*, 5th ed., 413 *et seq.*; *Salisbury etc. Society v. Cutting*, 50 Conn. 113, reporter's note.

**SALES — PASSING OF TITLE — TENANCY IN COMMON.** — The plaintiff sold to the defendant not less than 1600 nor more than 2300 bushels of corn at a certain price per bushel, and received \$50 of the purchase-money. The corn was in two cribs, one containing 1600 bushels intact, and the other, which had been opened, about 700 bushels. The plaintiff reserved a right to retain 200 or 300 bushels, if he needed them, and a third party was entitled to 50 bushels. Before any corn had been separated from the mass the entire lot was burned. *Held*, that as to 1600 bushels, at least, title had passed to the defendant. *Welch v. Spier*, 72 N. W. Rep. 548 (Iowa).

The general rule is that when a contract is made for the sale of part of a specific mass, no title passes to the buyer until appropriation of a certain portion to that contract. *Campbell v. Mersey Dock, etc.*, 14 C. B. N. S. 412. But this is only a rule of presumption, and if it appears to be the intention of the parties that title should pass, it will pass. *Kimberly v. Patchin*, 19 N. Y. 330. In the principal case the facts seem to show such intention. As no particular grains of corn can be selected, there is no difficulty, in the nature of things, in holding the defendant a tenant in common as to the 1600 bushels. It has been strongly urged that the purchaser from the proprietor of a grain elevator, where the mass is constantly changing, is a tenant in common. 6 Am. Law Rev. 469. *A fortiori* the purchaser of a part from a specific mass would be. *Chapman v. Shepard*, 39 Conn. 413.

**STATUTE OF LIMITATIONS — AMENDMENT OF DECLARATION.** — In 1884 plaintiffs, though unincorporated, brought action as a corporation. Defendants did not plead *null tiel corporation*. Plaintiffs got judgment and defendants appealed. In 1895, while the case was still pending in the courts, plaintiffs amended their declaration, substituting their own names as plaintiffs. *Held*, that defendants could then plead the Statute of Limitations in bar of the claim. *Beaty v. Atlantic, &c. R. R. Co.*, 28 S. W. Rep. 32 (Ga.).

The court says that, as the defendants had failed to plead *null tiel corporation*, they could not afterwards, while the declaration was in its original form, avail themselves of the fact that the party plaintiff was really non-existent. The running of the statute was of course stopped by the entry of suit so far as that action was concerned. But as soon as the declaration was amended, the defendants could at once say that the former proceedings were really void for want of a party plaintiff, and therefore of no effect to interrupt the running of the statute. Therefore action was barred. The reasoning seems entirely sound, but the result arrived at is curious. By making their declaration correct, when before it was in strictness false, the plaintiffs threw themselves out of court.

**TORTS — ALLUREMENTS TO CHILDREN.** — A waterworks company maintained upon its grounds a reservoir of water, attractive to small boys, who, to its knowledge, and without objection on its part, were accustomed to resort there. *Held*, that if the company took no reasonable precautions to prevent accidents, and one of the children, without negligence on his part, fell in and was drowned, the representatives of the deceased might recover damages from the company for his death. *Price v. Atchison Water Co.*, 50 Pac. Rep. 450 (Kan.).

The court shows a tendency to take the untenable position that a failure to object to the entry of the boys on the land was equivalent to an express permission to them to come, but in general the opinion follows the line of argument in the turntable cases, laying down a special rule for infant trespassers. *Keffe v. Mil. & St. P. R. R. Co.*, 21 Minn. 207. In the majority of cases where the cause of injury has been a reservoir of water, as above, an opposite conclusion has been reached, some of these decisions being in jurisdictions which allow recovery in the Turntable cases. *Peters v. Bowman*, 115 Cal. 345. There would seem, however, to be no distinction on principle between the two classes of cases. In the principal case the deceased had been repeatedly warned of the danger, and was apparently of such an age as to understand that it was wrong for him to go on the defendant's land; this would place him in the position of an adult trespasser and would justify a different result.



**TORTS — LIBEL — PRIVILEGE.** — In an action of libel, an affidavit made in the course of a former judicial proceeding was held only conditionally and not absolutely privileged. *Sommers v. Christiano*, 47 N. Y. Supp. 115.

It appears that the affidavit was material and relevant to the issue in the suit in which it was made. According to the great weight of authority, not even express malice will render such a statement actionable. *Garr v. Selden*, 4 N. Y. 94. Nevertheless, the proposition of the principal case has met with the approval of some courts. *Masterson v. Brown*, 72 Fed. Rep. 136 (criticised in 10 HARVARD LAW REVIEW, 134). Cf. Bishop on Non-Contract Law, § 298. Indeed, this doctrine would derive considerable support from *White v. Carroll*, 42 N. Y. 161, if that case had not been overruled, or at least explained, in *Marsh v. Ellesworth*, 50 N. Y. 309. This latter decision, which would be binding upon the lower New York courts, was not cited in the case under review.

**TORTS — NEGLIGENCE.** — The defendant's workmen were allowed to take refuse timber on a train which carried them home from their day's work. They had a regular habit of throwing this timber from the train while in motion. A piece thus thrown struck and injured the plaintiff, a traveller on the highway. At the trial, a verdict was ordered for the defendant. Held, the question of the defendant's negligence should have been left to the jury. *Fletcher v. Baltimore & P. Ry. Co.*, 18 Sup. Ct. Rep. 35 (D. C.).

The defendant was not liable for the negligence of its servant on grounds of agency, because the act causing the injury was not within the scope of the servant's employment. Mechem, Agency, § 734. But the court held this was not the proper test of the defendant's liability, and its reasoning seems sound. The defendant owed the duty of using reasonable diligence to see that persons on the highway were not injured by negligent or dangerous acts done on its train. Knowledge of and acquiescence in habitual acts which were negligent and dangerous, and which the defendant might have stopped, were evidence of a breach of this duty. Therefore the question should have been left to the jury. *Snow v. Fitchburg R. R. Co.*, 136 Mass. 552.

**TRUSTS — CONSTRUCTIVE TRUST — STATUTE OF LIMITATIONS.** — A trustee in violation of his express trust conveyed the *res* to S, who had knowledge of the objection of N, one of the *cestuis*. S afterwards always recognized the interests of all the *cestuis*. Held, that immediately upon the conveyance the Statute of Limitations began to run in favor of S as against N, and that the recognition by S of the rights of N, not being in writing, could not change his position to that of an express trustee. *Nouges v. Newlands*, 50 Pac. Rep. 386 (Cal.).

The court correctly holds S to be an implied or constructive trustee, but on the authority of *Hecht v. Slaney*, 72 Cal. 363, declares that the Statute of Limitations runs in favor of a constructive trustee although he has not repudiated the trust. In case of an express trust the Statute does not begin to run until there has been a repudiation of the trust to the knowledge of the *cestui*. It then runs on the theory that the trustee holds by adverse possession, which of course cannot exist so long as the rights of the *cestui* are recognized. Perry on Trusts, § 864. There is in this respect no difference between an express and an implied trust; they differ only in the mode of their creation. The admissions of the trustee in the principal case should have been a bar to the Statute. The court erred in considering that the recognition of the *cestui's* rights had no more force than a parol declaration of a new and express trust which was void because not in writing. The case cited was furthermore no authority, because there were no admissions by the trustee. *Doe v. Jewell*, 18 N. H. 240, is directly in point and *contra*.

**WILLS — CONSTRUCTION — DETERMINATION OF CLASSES.** — The testator devised a fee to A, who was the sole heir presumptive when the will was made. In case A should die without issue surviving, there was an executory devise over to the persons who should be the testator's heirs. A survived the testator and died without issue. Held, that the executory devisees were those who would have been the testator's heirs if he had died when A died. *Welch v. Brimmer*, 47 N. E. Rep. 699 (Mass.).

The decision is sound. It is a reasonable assumption that the testator knew that A would be his sole heir. The executory devise then would be rendered meaningless if, according to the general rule, the class of heirs should be determined at the testator's death, for A would be deprived of the property merely that he might get it back as executory devisee. The devise over shows a deliberate intention to exclude A if he should die without issue, and to give effect to this intention the class must be determined at A's death. The case differs from those cases where a remainder is given to the heirs after a life estate to the sole heir presumptive, for probably in such cases the testator, having made all the provisions for particular individuals that he desires, and finding that there is still something left, gives it to the heirs with no definite intention except to complete the disposition of the property. In such cases the word "heirs" should be given its ordinary meaning, and the class should be determined at the testator's death. The authorities are well collected in the principal case.

## REVIEWS.

SELECT PLEAS IN THE COURT OF ADMIRALTY. Vol. II. Being Vol. XI. of the Publications of the Selden Society. Edited by Reginald G. Marsden. London: Bernard Quaritch. 1897.

The Selden Society's previous volume on the Court of Admiralty—the work of the same editor—was reviewed in the *HARVARD LAW REVIEW*, vol. ix. p. 162. The present volume opens with an historical introduction, which takes up the history of the court at the point where it was left by the previous volume, and which contains, among other things, an extremely interesting "Table of some of the cases litigated in the Admiralty, A. D. 1528-1602, and not elsewhere mentioned in these volumes," and a brief indication of the contents of many other papers. As the editor, both in the introduction and elsewhere, gives minute references to the files in the Record Office, it becomes easy for any subsequent investigator to procure full knowledge of the contents of many valuable papers. Such as seemed to the editor most important are printed in full, with translation when necessary, and with useful annotation. The reprinted documents cover the years 1547-1602, and include a few of earlier or later date. Even a hasty turning of the pages reminds one that the reigns of Edward VI., Mary, and Elizabeth were times of commerce, piracy, and foreign war; and more careful examination gives glimpses of Sir Francis Drake, Sir John Hawkins, Sir Humphrey Gilbert, Sir Walter Raleigh, Lord Howard, and the Spanish Armada.

In the documents reprinted, the matters peculiarly interesting are: Deodand, p. 200; Mariners' wages on loss of ship or abandonment of voyage, pp. 25, 122, 131; Prepaid freight, p. 93; General average, p. 39; Charter-party with general average clause, p. 64; Bills of lading, and responsibilities of carriers, pp. 59-64, 124, 142, 146, 184, 202; Salvage, pp. 87, 129, 175, 178, 188, 191; Joint captors, pp. 95, 130; Collision, pp. 136, 167; Instruments securing loans,—usually hypothecating ships or goods, or providing that the loan shall be payable after the arrival of the ship, but sometimes following the ordinary terms of a bill of exchange,—pp. 65-77; Sentences in bottomry cases, pp. 175, 185, 191; Contracts for sale, with provision as to peril of the sea or of capture, pp. 12, 64; Forms of policies of insurance, pp. 45-59; Sentences in insurance cases, pp. 120, 132, 143.

Some of the documents enumerated above indicate the wide and uncertain boundaries of the jurisdiction assumed, nor without protest and ultimate curtailment; and other documents interesting from that point of view are found on pp. 88, 137, 156, 186.

For the Admiralty records in insurance cases, the editor surely makes no high claim. He says, at p. lxxx, "Insurance law alone owes little to Admiralty judges. The Court of Admiralty does not seem to have given satisfaction to underwriters or merchants. With the exception of a few cases which found their way into the court during the latter half of the sixteenth century, most of which are noticed in the present volume, there is little to be found on the records relating to insurance." Yet at pp. lxxviii and 129 of his previous volume as to the Court of Admiralty the editor demonstrated from the Admiralty records that *Crane v. Bell* (1546)—stated in 4 Co. Inst. 139 as an insurance case, and sometimes cited as



the earliest insurance case known—had nothing to do with insurance; and in various parts of the present volume he has given references to the papers of more than thirty insurance cases in the Court of Admiralty from 1548 to 1591; and from the materials thus shown to be accessible he has printed policies dated 1547, 1548, 1555, 1557, 1558, 1562, 1563, 1565, and 1638, and three sentences delivered in 1561, 1565, and 1570, respectively. As most of the policies thus printed are much earlier than any English policies hitherto accessible, and as the earliest insurance case formally reported in the common law or chancery courts is a century later than the earliest insurance case in the Court of Admiralty to which this volume gives a reference, and as the reports contain allusions to only two or three insurance cases earlier than the seventeenth century,—those two or three bearing date in the last quarter of the sixteenth century,—it seems that the editor has taken much too modest a view of the value of the Admiralty records to one interested in the history of insurance.

E. W.

A TREATISE ON THE LAW OF CARRIERS OF PASSENGERS. In two volumes. By Norman Fetter. St. Paul: West Publishing Co. 1897. pp. xli, 1693.

The statement of the principles of the law of carriers of passengers in this work of Mr. Fetter's is fairly accurate. Had the book been condensed into one volume, it would have been satisfactory, except for the rather confusing treatment of some questions upon which there is a difference of opinion, as in §§ 531-532. But in the effort to expand it into two volumes, the author has carried to excess the useful practice of stating cases illustrative of the general principles. In chapter xxxviii. he has devoted thirty-four pages to the statement of verdicts of juries which have been upheld or set aside on account of the amount of damages. The long note to § 28 is another illustration of the same fault. Nor has proper care been taken to cut down to a reasonable length the abstracts of the cases which are stated; § 328 is one out of many instances. Moreover, the chapters on Damages, Evidence, and Pleading seem too long. Those subjects are not a part of the law of carriers of passengers, and might well have been more summarily treated.

The chapters on Contributory Negligence are the best in the book, and, on the whole, are well done. But the chief merits of the work, and those which will commend it to the profession, are an entertaining preface, a useful index, and a good collection of authorities.

J. H. F.

GENERAL DIGEST. Vol. III., New Series. (January 1, 1897, to July 1, 1897.) Rochester: The Lawyers' Co-operative Publishing Co. 1897. pp. ix, 1562, xxv.

This latest volume of the General Digest contains a new feature which must necessarily make this work of even greater value to the profession than it has been hitherto. This improvement consists of an elaborate system of annotation. The judges themselves furnish notes on the authorities relied upon by the court in the case digested, outside of its own decisions, with citation of the cases criticised, distinguished, limited, or overruled. In addition to these notes, there is included an editorial compilation of the authorities on important questions raised by the current decisions. With the exception of the annotation, the general character of the Digest is the same as in previous volumes of the series.

H. D. H.



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## LIABILITY OF LANDOWNERS TO CHILDREN ENTERING WITHOUT PERMISSION.

IS a landowner responsible, so far as the condition of his premises is concerned, to children entering without permission, when he would not be liable to adults under similar circumstances?

To adults entering without permission<sup>1</sup> the landowner owes some legal duties. He is under a duty not to intentionally inflict harm upon a trespasser, save when he is exercising within legal limits the rights of defence and expulsion. He is also, by the better view, under a duty to avoid harming the trespasser by negligent acts which result in actively bringing force to bear upon the trespasser. In other words, he is under a duty to use care not to harm the trespasser by bringing force to bear upon him. It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before he sets in motion a force which would be likely to

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<sup>1</sup> The words "without permission" are intended to exclude the case, not only of the "business visitor" and the "invited person," but also that of the "licensee;" whether the license be expressed in words or is a "tacit license" inferred as matter of fact from a failure to object to previous entries. Cases where the existence of an actual, though tacit, invitation or license can be found as a matter of fact, do not fall within the scope of this article. "Implied invitation," in the sense of "implied solely by construction of law," will be referred to later.

endanger any such persons if within reach.<sup>1</sup> But the alleged duty, if admitted, is material only when it is sought to make the landowner liable for actively bringing force to bear upon the trespasser.

On the other hand, the landowner is under no duty to have his land in safe condition for adult trespassers to enter upon. The law does not oblige him to keep his premises in repair for the benefit of a trespasser. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes; he takes the risk of the condition of the premises. It is not negligence in a landowner to use his land for his own convenience in a manner which may occasion danger to future trespassers thereon.<sup>2</sup> It is no breach of duty to a trespasser "that a man's premises were in a dangerous state of disorder, whatever the consequences to the former." Nor is there any obligation to warn trespassers of dangers not readily apparent (assuming, of course, that the dangers were not prepared with intent to harm trespassers).<sup>3</sup> If the land is adjacent to a public highway, the owner may be liable for making changes on his land which endanger the safety of travellers who, notwithstanding their use of due care, accidentally deviate from the highway limits. But, with this exception, the owner is not responsible for the condition of his premises to persons entering thereon without permission.<sup>4</sup>

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<sup>1</sup> For some of the recent conflicting authorities on this question, see *Lindsay v. Canadian Pacific R. R. Co.*, 1896, Vermont, 35 Atlantic Rep. 513; *Louisville & N. R. Co. v. Vittitoc's Adm'r*, 1897, Kentucky, 41 Southwestern Rep. 269; *Gunn v. Ohio River R. Co.*, 1896, West Virginia, 26 Southwestern Rep. 546; *Pickett v. Wilmington & W. R. Co.*, 1895, 117 North Carolina, 616; *Texas & P. R. Co. v. Breadow*, 1896, Supreme Court of Texas, 36 Southwestern Rep. 410; *St. Louis, etc. R. Co. v. Ross*, 1896, Arkansas, 33 Southwestern Rep. 1054; *St. Louis, etc. R. Co. v. Bennett*, 1895, 69 Fed. Rep. 525; *Sheehan v. St. P. & D. R. Co.*, 1896, 76 Fed. Rep. 201; *Wabash R. Co. v. Jones*, 1896, 163 Illinois, 167. For statutes requiring railroad companies to keep some person on the locomotive "always on the lookout ahead," see *Milliken & Vertrees' Code*, Tennessee, s. 1298, subs. 4; *Sandels & Hill*, Dig. Arkansas, s. 6207.

<sup>2</sup> Bishop's Non-Contract Law, s. 845.

<sup>3</sup> "As towards trespassers . . . there is no implied representation of safety at all and therefore no duty to warn of any concealed source of danger. . . ." Clerk & Lindsell on Torts, 2d. ed. 422.

<sup>4</sup> To the above general rule, a seeming exception is presented by certain cases relative to damage done by ferocious animals. The landowner has been held liable to an adult trespasser for harm done by ferocious animals which he keeps upon his premises, even in cases where the animals were not kept for the purpose of attacking trespassers. Decisions such as *Marble v. Ross*, 1878, 124 Mass. 44, may appear inconsistent with the general doctrine as to the non-liability of the owner for harm done to adult trespassers by the condition of the premises. On principle, it is not easy to distinguish between responsibility for animate and inanimate property. The difference may possi-

Such, in brief, are the legal relations between landowners and adults entering without permission. Is there any difference in the case of children so entering? No doubt the landowner's duty to refrain from the intentional or negligent infliction of harm by affirmative acts done after the entry, exists in the latter case as fully as in the former. The vexed question is, whether he is under any liability as to the condition of the premises. If the intruder suffers harm by coming in contact with dangerous objects while the landowner remains passive, is the latter responsible for damage thus suffered by reason of the dangerous condition of his premises but without his active intervention?<sup>1</sup> Probably it will not be contended that the owner is liable even to children for harm happening from the condition of premises which have been left by him in their so-called "natural" state.<sup>2</sup> But suppose that changes are made by him in the course of a beneficial user; and that these changes, though in all other respects reasonable and lawful, have the double effect of attracting young children to the land and at the same time exposing them to serious danger if they yield to the attraction. Is the owner, who knows, or ought to know, the situation, under a duty to take special precautions for the safety of such children, either by keeping them out or by protecting them after entry; and, if he does not take such special precautions, is he liable to children who enter and are hurt?

Upon the question thus presented there is, in this country, a

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bly be due to an "accident of history." The law as to responsibility for animals crystallized early; and more stringent rules were established as to the owner's liability than now generally prevail as to his responsibility for inanimate chattels. There was, perhaps, a tendency to completely identify the owner with the animal. American judges who have refused to follow the lead of *Fletcher v. Rylands*, appear inclined to regard some of the present doctrines as to absolute responsibility for animals as a survival of early conceptions, and as constituting a class of exceptions not to be extended by analogy. In this connection, see Ray on "Negligence of Imposed Duties—Personal," pp. 585, 586.

<sup>1</sup> In a note at the close of this discussion, there will be found collected upwards of sixty cases where attempts have been made to hold landowners liable to children who entered without actual invitation or permission. In five-sixths of these cases there is no pretence that the harm to the child was caused by the landowner's setting force in motion, or keeping force in motion, while the child was on his premises. On the contrary, in this large proportion of cases the harm occurred by the child's coming in contact with the land, or with water covering the land, or with objects on the land which were in a state of rest, or with objects which were set in motion by the child himself or by his companions.

<sup>2</sup> "An allurements seems to be some attraction added to land, not the mere effect of land in its natural state." 1 Beven on Negligence, 2d ed. 189, note 1.



remarkable conflict of authority.<sup>1</sup> Although there are earlier cases bearing on the subject, there was little direct discussion of it before 1870; and it is probable that the general interest of the profession in the question was first excited by the decision of the U. S. Supreme Court in 1873, in *Sioux City etc. R. R. v. Stout*,<sup>2</sup> one of the earliest of the series, now known as "The Turn-table Cases." In later years the decisions have come thick and fast; but unanimity of judicial opinion has not been attained.

The problem which has occasioned such a wide divergence of opinion is not easy of solution. Arguments of weight have been adduced in favor of either view. But, in addition to these really important considerations, we find in use a set of phrases which are capable of being understood, and frequently are understood, as affirming positions which seem to us utterly untenable. These phrases have made such a profound impression on some judges as to obscure the vital point of inquiry and thus prevent a careful consideration of the real question at issue. It is desirable, at the outset, to ascertain what, if any, justification there is for the positions which these phrases are sometimes supposed to affirm. And if those positions are found to be untenable, this misleading phraseology should be discarded in the further discussion of the main question.

It is said that the landowner, in a case like that we have supposed, must be regarded as having invited, allured, or enticed the children to come upon his premises and submit themselves to the perils there encountered. It is alleged that he is in the position

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<sup>1</sup> In other countries the question has not received so much judicial discussion. Various English cases have been cited in the American courts, but none of them appear to be direct decisions. From the general tone of the English courts upon related topics, the inference would seem adverse to the child's claim in the hypothetical case stated in the text. The non-appearance of such cases in the English reports may be due to an opinion in the profession that such actions are not maintainable. For somewhat conflicting observations of English authors, see Clerk & Lindsell on Torts, 2d ed. 436, 437; 1 Beven on Negligence, 2d ed. 183-190.

The point has been more considered in the Scotch courts, but the law there does not seem decisively settled. See Glegg on Reparation, 231-232, 245-248; and Guthrie Smith on Damages, 144-147.

In Australia, a recent decision of the court of New South Wales is favorable to the landowner. *Patterson v. Borough of Woollahra*, 1895, 16 New South Wales Law Reports—Cases of Law, 229. There a boy was hurt while playing with a crane left in an abandoned quarry and so ineffectually fastened that children had repeatedly undone the fastening and played with the crane. See also *Slade v. Victorian Ry.*, 1889, 15 Victorian Law Reports, 190.

<sup>2</sup> 17 Wallace, 657.

of one who sets a trap for the innocent; and he has even been spoken of as an active aggressor. The natural meaning of these strong expressions is, that the landowner actually intended and desired that the children should come upon his land, and that the changes on his premises were made by him for the express purpose of attracting children to encounter peril. If such were the fact, it may readily be conceded that the case of the landowner would be as hopeless as that of Herod. But no sane man believes that people who are making beneficial use of their own land do in fact entertain the intention of thereby alluring children to their destruction.<sup>1</sup> The persons who use these expressions will, when cross-examined, admit that the "invitation" does not exist in actual fact, but only by construction of law.<sup>2</sup> So too as to the "intent" naturally implied by these phrases; they will either disclaim any such imputation,<sup>3</sup> or they will say that the

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<sup>1</sup> "The excavation for a reservoir was not made and filled with water for a trap, but for lawful use by the defendants on their own land. The work of filling it was not carried on for the purpose of attracting boys there and giving them sport and pleasure, but for the improvement and beneficial use of the city's land. . . . It was not a case of setting a trap for the children. . . . It was the ordinary case of a landowner managing, within the boundaries of his own land, his own property in his own way for his own use and benefit. . . ." Allen, J., in *Clark v. Manchester*, 1882-1883, 62 New Hampshire, 577, pp. 580-581.

<sup>2</sup> See *Harriman v. Pittsburgh, etc. R. Co.*, 1887, 45 Ohio State, 11, pp. 30, 31; *Tarleton, C. J., in Texas & P. R. Co. v. Brown*, Texas, 1895, 33 Southwestern Rep. 147.

The question whether the child should be regarded as *licensed* by implication or construction of law is not specially discussed here. The advocates of the child have generally seen fit to put their case on the higher ground of implied *invitation*. The objections against implying invitation by construction of law may also be urged against implying license. There is no more reason for upholding one of these fictions than for upholding the other.

It has already been explained that cases where the existence of an actual, though tacit, invitation or license can be found as matter of fact, do not fall within the scope of this article. It would therefore be irrelevant to discuss here the question, what evidence is sufficient to justify a finding that there was in fact an invitation or license. But it may be remarked, in passing, that some decisions seem to have gone too far; viz., the cases which tend to obliterate the distinction between invitation and license regarding permission as the full equivalent of invitation; also the cases tending to the view that a mere failure to prohibit or punish trespassing confers on all future comers the fullest right that can exist in a person expressly licensed to enter. In this connection, see *Price v. Atchison Water Co.*, 1897, Kansas, 50 Pacific Rep. 450, p. 452.

<sup>3</sup> We must do the Supreme Court of Minnesota the justice to say that, in their initial opinion on this subject, it was expressly admitted that the defendant did not leave the turn-table unfastened, "for the purpose of injuring young children." The learned court, however, made use of very strong expressions, which have sometimes been referred to by other courts without any mention of the accompanying disclaimer. In the Minnesota case, Mr. Justice Young said: "Now what an express invitation



intent exists in law, though not in fact; i. e., that its existence must be presumed by some process of legal construction. They will rely upon the presumption that "every man intends the probable consequences of his acts." It is alleged that the probable consequence of certain modes of using land is to attract children, and to result in harm when they yield to the attraction. The landowner, it is said, ought to know the above facts, and ought to foresee that a harmful result will follow in occasional instances. If he ought to foresee such a result, it is argued that the law ought to regard him as if he had actually foreseen it. And then it is virtually claimed that actual knowledge and foresight of the probable result is equivalent to actual intention or desire that such result should take place. Right here we take issue. Failure to advert to probable consequences, or even knowledge that certain consequences are probable, is not equivalent to intent or desire that such consequences shall follow. In such cases it may, or may not, be right to hold the landowner liable on the ground of negligence. That is a separate question, which will be discussed later. But it is not right to hold him liable *on the ground of intention*, where no intent actually existed. Nor is it right, while considering whether to hold him on the ground of negligence, to throw into the scale against him the argument that he must be regarded as having actually intended the result. This sort of reasoning, carried to its logical extreme, would annihilate the distinction between negligence and intention. It also blurs the distinction between knowledge and intent. "Intention," says Markby, "is the attitude of mind in which the doer of an act adverts to a consequence of the act and desires it to follow. But the doer of an act may advert to a consequence and yet not desire it; and therefore not intend it."<sup>1</sup> The so-called presumption, "that every man intends the probable consequences of his acts," is not a rule of law "further or otherwise than as it is a rule of

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would be to an adult, the temptation of an attractive plaything is to a child of tender years." Also: "The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurements, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them) . . ." *Keffe v. Milwaukee & St. Paul R. Co.*, 1875, 21 Minn. 207, pp. 211, 212.

<sup>1</sup> Markby's *Elements of Law*, 3d ed. s. 220. Compare Holmes on the Common Law, p. 134: "But when you prove knowledge you do not prove intent."



common-sense."<sup>1</sup> In other words, the "presumption" is, at most, only a *prima facie* presumption; and may be strong, weak, or utterly inefficacious, according to the varying situations where the attempt is made to apply it. If the result in question is one which men are frequently prone to desire, and there is no assignable reason for the act except the single one of accomplishing that particular result, the inference that the result was intended is strong. If, on the other hand, the result is one which not one man in ten thousand desires, and there is another assignable reason for the act, and one moreover by which men are generally influenced and which is amply sufficient to account for the act, the inference is, practically speaking, reduced to zero. A man who builds a cistern and leaves it open at the top, generally intends that rain water shall accumulate therein. He does not generally intend that people shall fall into the water thus collected and be drowned. There may, in some instances, be room to argue that he ought to be held liable for the latter result on the ground of negligence; but it is an entire perversion of language, and a total confusion of legal distinctions, to say that he is liable on the ground that he intended such a result. It is not just to enhance the alleged moral obliquity of his conduct by imputing to him an intent which exists only by construction or fiction. Mr. Bishop has well said that "in reason we cannot first draw an evil intent from an act, and then enhance the evil of the act by adding this intent back again to it"<sup>2</sup>

A similar instance of misleading phraseology is to be found in the oft quoted statement: "Now what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years."<sup>3</sup> This sentence (though probably not so intended by its learned author) is capable of being understood as an assertion that the landowner who introduces upon his land some object which may present to children the attraction of a plaything, should be regarded as thereby intending to induce children to enter upon his land, just as much as if he had expressly invited them; the only difference being that in the latter case his intention is evidenced by words, and in the former by conduct. Such an inference as to intent might perhaps be well founded if the object was of such a nature that it could serve no

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<sup>1</sup> 2 Stephen, Hist. Crim. Law of England, 111.

<sup>2</sup> 1 Bishop, New Crim. Law, s. 735, par. 2.

<sup>3</sup> Young, J., in *Keffe v. Milwaukee & St. P. R.*, 1875, 21 Minn. 207, p. 211.

other purpose than that of a plaything (and if the landowner had no children of his own to play with it). But such a state of facts is not found in the class of cases now under consideration, nor did it exist in the case pending before the learned judge by whom the above statement was enunciated. The so-called attractive "plaything" of the landowner will generally prove to be an object whose introduction upon the land is a practical necessity to the landowner, and often to the entire community: e. g., the saw-mill of the lumberman, the forge of the blacksmith, the threshing-machine of the farmer, or the turn-table of the railroad. The effect of such objects upon children may be to attract them to the land. But the effect upon the children does not always furnish satisfactory evidence that such objects were placed upon the land for the purpose of producing that effect. The landowner had another and a sufficient purpose for the introduction of such objects; a purpose the accomplishment of which would be impeded (and in some cases absolutely frustrated) by the presence of his neighbor's children upon his land. Whether the landowner should be held liable on the ground of negligence — i. e., whether the law should impose upon him a duty of using special care to guard his neighbor's children from dangerous contact with these attractive objects, — is a fairly arguable question, to be considered hereafter. but there is no room whatever to hold him liable on the ground of intent, either actual or constructive. And as there is no justification for imputing to him "intent" in the ordinary signification of that term, a *fortiori* there is no reason for imputing it in the sense of ulterior intent or motive. It should be added that the sentence in question contains another word which is capable of misconstruction. When we speak of "temptation" in such a connection, it is well to explain whether we refer to things done with actual intent to induce others to act, or to things done with an entirely different purpose, but which may have the incidental and unintended effect of inducing action by others. If the word is used in the latter sense, the law would seem to be correctly stated by Mr. Justice Holmes in the recent case of *Holbrook v. Aldrich*:<sup>1</sup> "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of

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<sup>1</sup> 1897, 168 Mass. 15, p. 16.

property rights because the temptation to untrained minds to infringe them might have been foreseen."

In some, perhaps in most, of the opinions indulging in this talk about "allurement," etc., the courts have also said that the defendant has been negligent and that he is liable on the ground of negligence. If, then, as a general rule, defendants are professedly held liable on the ground of negligence, and if full damages are recoverable for negligence, why spend time in criticising the language of the court implying that the same result might also be reached on another and distinct ground, viz., implied intention? The answer is twofold. First: Because all this talk implying the existence of intent tends to obscure the issue as to negligence. Second: Because this same talk tends to prejudice the defendant in the decision upon the issue of negligence.

Some of the errors upon which we have been commenting may be attributed, not only to the overstraining of a presumption, but also to the misapplication of a frequently cited case; viz., *Townsend v. Wathen*.<sup>1</sup> It seems to be supposed that either the point there decided, or the language of the court, sustains the use (in the present controversy) of the phrases we deem so objectionable, and especially the comparison of the landowner to one "setting a trap" for the innocent. But this supposition is erroneous, as a succinct statement of that case will demonstrate. The declaration alleged that the defendant, "wrongfully intending to catch, maim, and destroy the plaintiff's dogs," placed traps, baited with flesh, in a wood on defendant's land, near divers highways and near the grounds of the plaintiff; and that the plaintiff's dogs were, by the scent of the flesh, enticed from the said highways and grounds to the traps, and were caught therein and wounded. A verdict was returned to the plaintiff, and a motion for arresting judgment was refused. The defendant also moved to set aside the verdict as against evidence; contending "that there was no evidence that the traps were purposely set to catch the plaintiff's dogs," or "that the traps were set for the purpose of catching dogs in general." The evidence on these points at the trial was, in brief: that the defendant had long maintained the traps in the situation alleged in the declaration; that in one year no less than seven dogs had been taken and killed in these traps; that the defendant had known and approved of it; and that the defendant allowed his

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<sup>1</sup> 1808, 9 East, 277.



gamekeeper one shilling for every dog killed in the traps. The court, of course, held that the above evidence was sufficient to justify the jury in finding that the defendant set the traps with the intent to catch and maim the plaintiff's dogs. Two of the judges, in their opinions, advert to the presumption that every man must be taken to contemplate the probable consequences of the act he does. But the judges did not say that this presumption alone would justify in every case a finding that the defendant actually intended or desired the result which he ought to have foreseen as probable. This question was not before the court; for, in that case, there was plenary evidence of actual intent without calling in the aid of any presumptions. The decision in *Townsend v. Wathen* is not in point to establish the liability of a railroad to a child attracted by a turn-table upon defendant's premises, unless it is proved that the railroad company maintained the turn-table with the express intention of catching and maiming the children of the neighborhood, and that the directors were in the habit of rewarding the section foreman at a certain rate per head for each innocent babe thus slaughtered. When Lord Ellenborough intimates that there is no difference between "drawing the animal into the trap by means of his instinct which he cannot resist" and "putting him there by manual force," the learned judge is evidently speaking, in both cases, in reference to results intentionally produced; i. e., acts done with the intent of bringing the animal into the trap.

The view just suggested as to the scope of the decision in *Townsend v. Wathen*, and its inapplicability in favor of child plaintiffs in turn-table cases, is fully sustained by the opinion in the very recent English case of *Ponting v. Noakes*.<sup>1</sup> The plaintiff's horse was poisoned by eating the leaves of a yew-tree which grew upon the defendant's land, and which the horse could reach only by stretching his neck over the boundary line. It was held that the defendant was not liable. Mr. Justice Collins, in the course of his opinion,<sup>2</sup> said: "Does it, then, make any difference that a yew-tree is likely to tempt a horse to trespass? I think not, unless it was proved that it was put or kept there for the purpose of enticing the animal to his destruction, as was done in the case of *Townsend v. Wathen*,<sup>3</sup> cited by Mr. Chitty. The wrongful intention was the gist of that action. If such intention is disproved, it follows, if

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<sup>1</sup> L. R. (1894), 2 Q. B. 281.

<sup>2</sup> Page 290.

<sup>3</sup> 9 East, 277.

the above reasoning is correct, that there can be no liability." The decision in *Townsend v. Wathen* is also fairly summarized in the following extract from the opinion of Mr. Justice Peckham in *Walsh v. Fitchburg R. Co.*<sup>1</sup> "... it was held that a man must not set traps of a dangerous description in a situation to invite, and for the particular purpose of inviting, his neighbor's dogs, as it would compel them, by their instinct, to come into the trap. The act of the defendant to that case was not done in the prosecution of his immediate and proper business, but, as the court held, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his property, and the enticement was effected by the means spoken of."

"There is no difficulty at all in holding parties liable for any intentional mischief, however it may be covered up. If they prepare means of destruction for the malicious purpose of destroying life or inflicting injuries, there is no room for the application of the doctrine of negligence, and the act which they mean to bring about is none the less their act because brought about indirectly."<sup>2</sup> ... But where injury arises to a person from the alleged neglect of one, in doing his lawful business in a lawful way, to provide against accident, the question arises at once whether he was under any legal obligation to look out for the protection of that particular person, under those particular circumstances. For the law does not require such vigilance in all cases, or on behalf of all persons."<sup>3</sup> Neither the ownership nor the use of a thing necessarily entails on the owner or user liability for damages suffered by a third person coming in contact therewith.<sup>4</sup> "I think," said Lord Lee, "it is well settled that the mere property of a subject from which damage arises is not sufficient by itself to render the proprietor responsible for the damage. There must be negligence on the part of the proprietor. He must have failed to perform some duty which the circumstances imposed upon him and the neglect of which led to the accident."<sup>5</sup> "If there be no duty, the question

<sup>1</sup> 1895, 145 N. Y. 301, p. 309.

<sup>2</sup> "In such cases the liability is not based upon the assumption that the owner owes a duty to the uninvited person to keep his premises reasonably safe, but upon the fact that he owes a duty to such person not to intentionally injure him. The failure to observe this distinction has led to much confusion." Denman, J., in *Dobbins v. Missouri, etc. R. Co.*, Texas, 1897, 41 *Southwestern Rep.* 62, p. 64.

<sup>3</sup> Campbell, J., in *Hargreaves v. Deacon*, 1872, 25 *Mich.* 1, p. 4.

<sup>4</sup> See Bishop, *Non-Contract Law*, § 828.

<sup>5</sup> *Ross v. Keith*, 1888, 16 *Scotch Session Cases*, 4th Series, 86, p. 91.

of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby." <sup>1</sup> "... if no duty, then no negligence, because the latter must have the former as its inevitable and indispensable predicate." <sup>2</sup>

If, then, the landowner is not to be held liable on the ground of intentional allurement where no intent in fact exists, the plaintiff must convince the court that the case is one where the law imposes a duty upon the landowner to exercise care for the special protection of the class of persons to which the plaintiff belongs. Does the law impose such a duty? Must the owner at his peril keep his land "free from objects by which discretionless, unattended children might be attracted and harmed," or so guard his premises as to keep such children out or protect them after entry? <sup>3</sup> Does the common law impose upon the owner of property the duty to use care to keep out, or protect, children of tender years attracted to his premises by the nature of the business carried on there? The question is not settled by authority; there being a remarkable conflict of decisions. It is, therefore, to be considered upon principle.

Upon the crucial inquiry whether the law should impose such a duty upon the landowner, there are considerations of undoubted weight to be urged in favor of either view. A balance must be struck between the benefit to the community of the unfettered freedom of owners to make a beneficial use of their land and the harm which may be done in particular instances by the use of that freedom. The true ground for the decision is policy; i. e., expediency, in the Benthamic sense of "the greatest good to the greatest number;" "and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed." <sup>4</sup>

On the one hand, it is the policy of the law to establish rules tending to preserve life, and to protect human beings from serious bodily harm. And this laudable purpose seems frustrated, *pro tanto*

<sup>1</sup> Denman J., in *Dobbins v. Missouri R. Co.*, Texas, 1897, 41 Southwestern Rep. 62, p. 63.

<sup>2</sup> Sherwood, J., in *Barney v. Hannibal & St. J. R. Co.*, 1895, 126 Missouri, 372, pp. 391, 392.

<sup>3</sup> See Finley, J., in *Missouri, etc. R. Co. v. Dobbins*, 1896, Texas, 40 Southwestern Rep. 861, p. 863.

<sup>4</sup> See Mr. Justice Holmes in 8 HARVARD LAW REVIEW, pp. 4, 6, 9.



by permitting a landowner to pursue with impunity a mode of user which he knows, or ought to know, is likely to occasionally result in the suffering of great harm on the part of some of his neighbor's children. The fact that a defendant neither desired nor intended to bring about a particular result does not necessarily exonerate him. The law not unfrequently holds defendants liable irrespective of their intention to do harm; and in some extreme cases may even hold them liable irrespective of the utmost care on their part, practically making them insurers against all harm resulting from certain classes of acts. "When a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification."<sup>1</sup> And this doctrine may be assumed to apply, even though he had no notice that his act was likely to cause damage to a specific person at a particular moment, but knew only that it was likely to cause damage to some unspecified person at some indefinite time. To escape liability, he must show that there are considerations equal or paramount to those urged in behalf of the plaintiff which justify his conduct notwithstanding the known risk of damage to others therefrom. He must sustain "a claim of privilege."<sup>2</sup>

On the other hand, the defendant justifies under his right or privilege to make a beneficial use of his own land in methods which will do no harm to persons remaining outside his boundary. The beneficial use of land is a primal necessity; not only to those individual landowners who happen to be defendants in lawsuits, but to the entire human race. "The business of life must go forward and the fruits of industry must be protected."<sup>3</sup> "It is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others, or even which obviously tend that way; and this in such a manner that their tendency cannot be remedied by any means short of not acting at all. . . . To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered. Like reasons apply to a man's use of his own land in the common way of husbandry, or otherwise for ordinary

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<sup>1</sup> Mr. Justice Holmes, 8 HARVARD LAW REVIEW, 9.

<sup>2</sup> See 8 HARVARD LAW REVIEW, 9.

<sup>3</sup> Cowen, J., in *Loomis v. Terry*, 1837, 17 Wendell, 496, p. 501.

and lawful purposes.”<sup>1</sup> It is true that the right of user is never literally absolute, and is always restricted to some extent “by rights residing in others, and by duties incumbent on the owner.”<sup>2</sup> But it is also true that every restriction diminishes *pro tanto* the beneficial character of the use; and hence the law imposes restrictions as seldom as possible, and never except upon the strongest grounds. If an opposite policy were pursued, it is easily conceivable that the improvement and beneficial occupation of land might become in fact impossible, and property in the soil for nearly all useful purposes might be annihilated.<sup>3</sup> To say, for instance, that B must keep his land in safe condition to be trespassed upon, would often result in practically depriving B of certain modes of beneficial enjoyment unless he takes precautions which are incompatible with profitable user, and might in effect amount to a confiscation of his land for the benefit of trespassers.

The difficulty of restricting the owner without practically destroying his interest is fully recognized by the law. It has been an important factor in inducing courts to refuse to impose restrictions in various instances where the case in behalf of the landowner is not so strong as in the matter now under consideration. We refer to the class of cases where the use of land, instead of harming only those persons who come upon the land, exerts a damaging influence upon persons and property situated beyond the border of the defendant's land. While there are, of course, many acts thus harmfully operating beyond the limits of his land for which an owner is held liable, there are also various acts of user which confessedly have a damaging effect upon persons and things outside the boundary of the land, and which nevertheless the law does not prohibit or punish.<sup>4</sup> “The fact that the damage is foreseen, or even intended, is not decisive, . . .”<sup>5</sup> And, by the weight of legal opinion, the motive of the landowner is not material. If the damage would not otherwise be actionable, it is not made so by proof that the owner was actuated by some motive other than a desire to beneficially use his own property; or even by proof that

<sup>1</sup> Pollock on Torts, 2d Eng. ed. 133, 134.

<sup>2</sup> 2 Austin, Jurisp. 3d Eng. ed. 837, 825-6; Markby's Elements of Law, 3d ed. 155.

<sup>3</sup> See Bartlett, J., in *Basset v. Salisbury Manuf. Co.*, 1862, 43 N. H. 569, p. 573.

<sup>4</sup> *Rogers v. Elliott*, 1888, 146 Mass. 349; *Middlesex Co. v. McCue*, 1889, 149 Mass. 103; *Gibson v. Stewart*, 1894, 21 Scotch Session Cases, 4th Series, 437.

<sup>5</sup> Holmes, J., in *Middlesex Co. v. McCue*, 1889, 149 Mass. 103, p. 104; and see *Rogers v. Elliott*, 1888, 146 Mass. 349.

he was actuated by a malicious motive to damage his neighbor.<sup>1</sup> The courts do not consider it for the interests of the community that the landowner who does not go beyond certain common and generally beneficial acts of user should be called upon to answer for damage thereby done, even where the thing damaged is outside the limits of his land.<sup>2</sup> And the majority of judges do not think that the owner should be exposed to the worry and expense of litigation at the hands of every suspicious person who may see fit to question his motive. "A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. . . . Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights."<sup>3</sup>

As might be expected, the law, which is reluctant to impose restraint upon an owner's use of his land even when causing damage beyond his boundary, is still more unwilling to impose restraint upon modes of user which are dangerous only to persons who intrude upon the land. The two considerations, that the beneficial use of land is a necessity, and that such use cannot easily be restricted without very substantial damage (if not total deprivation) to the owner, have had great weight with the courts, so far as the case of adult intruders is concerned. The owner of land is not liable for the condition of his premises to an adult who enters

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<sup>1</sup> See *Mahan v. Brown*, 1835, 13 Wendell, 261; *Jenkins v. Fowler*, 1855, 24 Penn. State, 308; *Chatfield v. Wilson*, 1855, 28 Vermont, 49; *Phelps v. Nowlen*, 1878, 72 New York, 39; *Falloon v. Schilling*, 1883, 29 Kansas, 292; *Corporation of Bradford v. Pickles*, L. R. (1895) App. Cases, 587; affirming L. R. (1895) 1 Chan. 145; Mr. Justice Holmes, in 8 HARVARD LAW REVIEW, p. 4. See, however, the forcible criticism of Barrows, J., in *Chesley v. King*, 1882, 74 Maine, 164, pp. 171-177.

<sup>2</sup> The knowledge of the exceptional infirmity of a neighbor "introduces no limitation of the ordinary right" of user of property. If the right to use property depends on the effect upon persons of peculiar temperament, "the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises." "Legal rights to the use of property cannot be left to such uncertainty." "A fluctuation in the duty respecting property would strike it with a sterility most baneful to national prosperity." *Rogers v. Elliott*, 1888, 146 Mass. 349; 1 Beven on Negligence, 2d ed. pp. 17, 18; *Ladd v. Granite State Brick Co.*, New Hampshire, 1895, 37 Atl. Rep. 1041. If the plaintiff in *Rogers v. Elliott*, instead of being an adult of peculiar nervous susceptibility, had been a young child terrorized by the defendant's mode of using his land, the result would probably have been the same.

<sup>3</sup> *Miller, J.*, in *Phelps v. Nowlen*, 1878, 72 New York, 39, pp. 45, 46. Compare *Holmes, J.*, in *Rideout v. Knox*, 1889, 148 Mass. 368, p. 372.



thereon without permission. That this is the result of the authorities, is a proposition not likely to be disputed. Possibly, however, it may be claimed that the establishment of this doctrine is not consistent with other well settled legal principles. It may be urged that there is a class of cases where the duty of the landowner to use care for trespassers is fully recognized; that this recognition is repugnant to the above doctrine; that one doctrine or the other must be abandoned; and that legal symmetry requires that the principle of the last-mentioned class of cases should be extended by analogy so as to include and apply to both adult and childish intruders who meet with harm owing to the condition of the premises. "You have admitted," it may be said, "that it is the better view that the landowner, under certain circumstances, owes a duty of care to adult trespassers. Why not extend this doctrine by analogy so as to impose a duty of care in cases of the class now under consideration? If the landowner is under a duty to use care to refrain from affirmative acts bringing force to bear<sup>1</sup> upon a trespasser whose presence is known, why not also impose upon him the duty to use care to prevent the entrance of trespassers (adults as well as children) in future, or to use care to keep his premises in such condition as will prevent harm therefrom to future trespassers after entrance?" The answer is, that there is a wide difference between the two cases, both in the stringency of the reasons for establishing a duty, and in the degree of the burden which would thus be imposed upon the landowner. The first case is that of a known, present, and immediate danger; one which is imminent and reasonably certain to result in harm, unless the owner then and there does, or omits to do, some act, the doing or omitting of which would avoid the danger. In the second case the danger may be said to exist chiefly in anticipation; it depends on the course of future events, upon circumstances as yet unknown and fortuitous.<sup>2</sup> In the first case the duty imposed upon the landowner involves simply a temporary, generally only a momentary, interruption of his user; requires only temporary precautions; does not include a duty to put the premises in such condition as to prevent the recurrence of similar emergencies in future, but merely requires the use

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<sup>1</sup> Except for purposes of defence or expulsion.

<sup>2</sup> See phraseology used by Dixon, C. J., in discussing a somewhat different topic, *Kellogg v. Chicago & N. W. R. Co.*, 1870, 26 Wisconsin, 223, pp. 257, 258.

of care in a present and known emergency.<sup>1</sup> In the second case the duty sought to be established is to guard against future dangers; it must frequently involve permanent changes in the mode of user; sometimes necessitating such expense and trouble as would be practically prohibitive of certain modes of user; and in some cases compelling the abandonment of all profitable use. There are some decisions<sup>2</sup> which go to the extent of holding that the landowner, under special circumstances, owes a duty to ascertain whether trespassers are present. But the existence of this alleged duty and the failure to perform it are material only when it is sought to hold the landowner liable for setting (or keeping) force in motion when the trespasser is actually present on his land. It has not been contended, so far at least as adult trespassers are concerned, that he is under obligation to prepare his land so as to prevent their future entrance, or so as to enable them in future to enter and occupy in safety. If I have reason to believe that adult tramps occasionally sleep in my meadow, and I start my mowing machine without looking ahead to see if any one is in the track of the proposed swath, some courts might hold me liable for running over a tramp if I could have avoided him by keeping a better lookout. But if I leave my machine in the field over night, and an intruder stumbles over it in the dark, no court is likely to hold me liable. He cannot maintain that I was bound to leave my land and chattels in such a condition as to render it safe for him to intrude and intermeddle. "There is a broad difference," said Mr. Justice Carpenter,<sup>3</sup> "between the case of a trespasser's meeting with an injury by reason of the dangerous condition of the defendants' prem-

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<sup>1</sup> "The obligation of the company and its operatives" to a trespasser on the railroad track "is not, then, pre-existing, but arises at the moment of discovery. . . . It excludes all inquiry respecting the character of the roadbed, cattle guard, locomotive, brake appliances, or other means of operation, or of the speed or manner of running the train up to the moment of notice, because no breach of positive duty is involved." It had been previously said that "the trespasser who ventures to enter upon a track for any purpose of his own assumes all risks of the conditions which may be found there." . . . Seaman, J., in *Sheehan v. St. Paul & D. R. Co.*, 1896, 76 Fed. Rep. 201, pp. 205, 204. In *International & G. N. R. Co. v. Lee*, 1896, Texas, 34 Southwestern Rep. 160, it was *held*, that no duty rests on a railway company, in favor of the public who use its tracks as a footway, to keep its switches blocked in its private switchyards to lessen the chances of injury to pedestrians. See *Akers v. R. R.*, 1894, 58 Minn. 540.

<sup>2</sup> As to the conflict of authority on this point, see *ante*, p. 350, note 1.

<sup>3</sup> *Mitchell v. Boston & Me. R. R.*, 1894, New Hampshire, 34 Atlantic Rep. 674, p. 677.

ises, and that of an injury caused by the defendants' active intervention."<sup>1</sup>

Assuming, then, that the law is not only settled, but is also consistent, in holding that the owner of land is not liable for the condition of his premises to an adult who enters without permission, the next inquiry is: What difference is there between the case of the adult intruder and the child intruder? Are there considerations which do not exist in the case of the adult, and which, when put into the scale, ought to turn the balance in favor of the child?

The two prominent arguments are: (1) that the child is innocent; (2) that the child is incapable of protecting itself.

What force is to be allowed to these considerations; and do they, when estimated at their true value, outweigh the reasons against imposing liability upon the landowner?

Concede (what in some reported cases seems very doubtful) that the child is incapable of taking care, is too young to be negligent, and is entirely innocent of intent to do wrong. What then? Of course, the innocence of a plaintiff does not *per se* establish the fault of a defendant. The landowner cannot be liable, unless he owed to the child a duty which he has neglected. Should the law, in view of the innocence of the child, impose on the landowner the duty here in controversy?

No doubt there are cases where a defendant is rightly held liable to a child plaintiff when he would not be liable to an adult plaintiff under similar circumstances. Where it is admitted that a duty exists to use care to avoid harm to both children and adults, (e. g., in the use of the public highway), then, in point of fact, more care may be required towards a child than towards an adult. In view of the child's helplessness and unconsciousness of danger more care may, as matter of fact, be required under the unvarying legal rule of "due care under the circumstances;" just as more care, in fact though not in law, may be required to avoid colliding with an obviously lame or blind adult than with a vigorous man in full possession of all his faculties.<sup>2</sup> But all this is true only

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<sup>1</sup> Attention has already been called, *ante*, p. 351, n. 1, to the fact that in a great majority of the attempts to hold the landowner liable, the child was not harmed by the landowner's setting force in motion or keeping force in motion while the child was on his premises. On the contrary, the child was harmed by coming in contact with objects which were at rest, or with objects set in motion by himself or his companions.

<sup>2</sup> A similar result might ensue in the case of an express license. The licensor owes the same duty to a child licensee as to an adult licensee: viz., to give warning of con-



where it is admitted or proved that a duty exists. "In considering the question as to whether a duty exists, there is no distinction between the case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former."<sup>1</sup> So if it be conceded or proved that the defendant was negligent, and that his negligence constituted part of the legal cause of the plaintiff's damage, then the incapacity and immaturity of a child plaintiff may furnish a good answer to the defence of contributory negligence. Conduct of the plaintiff which would have been negligent in an adult may not be held negligent in a child. But the fact that the child plaintiff was not "capable of contributory negligence" does not necessarily establish that the adult defendant was negligent. It does not *per se* prove that the defendant owed to the plaintiff a duty, or that he failed to perform a duty. "If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous."<sup>2</sup> "The fact that injury has resulted, and to a child himself incapable of negligence, will not import the negligence of the defendant, which is the sole ground of liability."<sup>3</sup> Obviously, cases of the two foregoing classes do not furnish arguments from analogy in favor of creating a duty towards children in situations where no duty at all would exist towards adults.

Why should innocent children have greater rights than innocent adults, in respect to damage resulting from the nature of the premises upon which they enter without permission? Remedy against the landowner for harm happening from the condition of the premises is denied to adults who are entirely free from intent to violate rights, and whose presence upon the land is due to pardonable mistake or to irresistible external force. The test is not whether their motives were innocent or even laudable, or whether their conduct was careful, but whether they entered without the

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cealed dangers known to himself. But a danger which would be readily apparent to the average adult might be non-apparent to a child; and hence warning might be due to the latter, and not to the former.

<sup>1</sup> Denman, J., in *Dobbins v. Missouri, etc. R. Co., Texas*, 1897, 41 Southwestern Rep. 62, pp. 62, 63.

<sup>2</sup> Lurton, J., in *Felton v. Aubrey*, 1896, 74 Fed. Rep. 350, p. 353.

<sup>3</sup> 1 Beven on Negligence, 2d ed. 183. See also Breaux, J., in *Culbertson v. Crescent City R. Co.*, 1896, 48 La. Ann. 1376, p. 1380; Vanderburgh, J., in *Emerson v. Peteler*, 1886, 35 Minn. 481, p. 484; Cockrill, C. J., in *Catlett v. St. Louis, etc. R. Co.*, 1893, 57 Arkansas, 461, p. 465.

owner's permission. If so, they cannot claim that the owner was under a duty to make things safe for their access, or to give warning of non-apparent danger.<sup>1</sup> It may possibly be suggested that an adult trespasser is barred upon grounds inapplicable to a childish intruder. It may be urged that the adult is barred by his own wrong: both (1) because he must always be regarded as guilty of contributory negligence; and (2) because, even if not negligent, he is a tortfeasor in the technical sense; whereas a young child may be incapable of negligence and ought not to be regarded as even technically a tortfeasor. But this argument entirely misconceives the true reason why an adult trespasser fails to recover in the case supposed. The decision turns, not upon the presence of fault in the plaintiff, but upon the absence of fault in the defendant. The plaintiff's action is defeated, not because his own wrong bars a recovery against the landowner who has neglected to perform a duty owing to him, but because he has not succeeded in establishing the primary proposition that the landowner owed to him the duty in question. His trespass is not necessarily and always a negligent act, and hence does not invariably bar him on the ground of contributory negligence.<sup>2</sup> Nor does his tort, even when he is a conscious and morally inexcusable trespasser, prevent his recovering against the landowner for negligently bringing force to bear upon him by a positive act done after his entry, i. e., by what Clerk & Lindsell<sup>3</sup> call "a negligent act of commission." But when an adult who entered without permission seeks to recover against the landowner for harm happening from the condition of the premises, he fails even though he were morally blameless. He may be a technical tortfeasor, but recovery is not denied to him by way of punishment for his own "wrong." He fails because the landowner owed him no duty to have the premises in safe condition for his entry.<sup>4</sup> Why should the moral innocence of a childish intruder raise a duty on the part of the landowner which is not created by the moral innocence of an adult intruder? The youthful innocence of the child does not make restrictions on the right of user less damaging to the owner, or make the alleged duty of preventing the entrance of an in-

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<sup>1</sup> See Barrows, J., in *Morgan v. Hallowell*, 1869, 57 Maine, 375, p. 377; Woodward, J., in *Gramlich v. Wurst*, 1878, 86 Pa. State, 74, p. 78.

<sup>2</sup> 1 Shearman & Redf. Negl. 4th ed. ss. 97, 98.

<sup>3</sup> 2d ed. 14.

<sup>4</sup> See Shearman & Redfield, *ubi supra*.

truder or of protecting him from harm after entry less burdensome, than in the case of an adult. Indeed, the duty would be more onerous in the case of a child.

It may, however, be urged that there are two particulars in which the case of the innocent child intruder can be distinguished from that of the innocent adult intruder. One distinction is, that the innocent intrusions of children are likely to occur more frequently, and to result in more serious damage, than the innocent intrusions of adults. This hardly affords ground for applying a different rule of law to the two cases. The other distinction is, that, in the class of cases now under discussion, the occasional innocent intrusion of the children is, *ex hypothesi*, the foreseeable result of the manner in which the landowner has chosen to make a beneficial use of his premises. In a certain sense, the innocent child may be said to have been "attracted" to the premises by the acts of the landowner; which is not generally true in the case of the innocent adult intruder. Looking at the matter solely from the standpoint of the child and considering solely his interest, the above considerations might prove entirely decisive. But the controversy cannot be decided without also looking at the matter from the standpoint and interest of the landowner, and giving due weight to his alleged justification. And when we look at it from his standpoint, we find that, *ex hypothesi*, the so-called "attractions" were placed on the land for his own business purposes; that their presence is reasonably necessary to carry out those purposes; and that his mode of using the land is confessedly lawful and proper, unless rendered otherwise in the eye of the law by their tendency to attract children and to endanger those yielding to the attraction. When the matter is thus viewed from both sides, we are simply brought back to the general question already stated:<sup>1</sup> whether the danger of occasional harm, under such circumstances, to innocent children outweighs the benefit to the community of leaving owners unfettered in making a beneficial use of their land in methods which cause no damage to persons outside their boundary. Our own impression is that it does not.

It has sometimes been (apparently) assumed that the exoneration or liability of the landowner must depend upon the question whether an action of trespass *quare clausum fregit* could have been maintained against the child. The weight of authority is in

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<sup>1</sup> *Ante*, p. 360.



favor of the view that a young child, even though not capable of negligence, is liable in trespass for an unauthorized entry.<sup>1</sup> But concede, for the sake of argument, that the child is not liable to be sued as a tortfeasor. Assume that a use by the owner of his property which has the unintended effect of attracting the child, constitutes a defence to an action of trespass against the child. Does it follow that the child has all the rights of an invited person or an express licensee? Does the above assumption necessitate the conclusion that his entry upon the land of another is a matter of right, to be protected and encouraged by the law, and hence imposing upon the landowner the special duty of preparing his land in advance for the safety of future childish intruders? In many of our States (contrary to the English common law) the entrance of animals upon unenclosed land does not make their owner liable in trespass *quare clausum fregit*. But the owner of the animals has no right (of entry or pasturage) "which can be demanded and enforced." There is "only an immunity from suit or punishment." The landowner is under no obligation to keep his premises in safe condition for the invasion of his neighbor's animals. If the animals are hurt by bringing themselves in contact with the soil, or with stationary objects thereon, the landowner is not liable.<sup>2</sup>

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<sup>1</sup> Cooley on Torts, 2d ed. 120; Clerk & Lindsell on Torts, 2d ed. pp. 37, 38; 1 Shearman & Redfield on Negligence, 4th ed. s. 98; Ames's Cases on Torts, 2d ed. 66, note 1. Compare Sherwood, J., in *Barney v. H. & St. J. R. Co.*, 1895, 126 Missouri, 372, p. 392.

<sup>2</sup> *Knight v. Abert*, 1847, 6 Pa. State (6 Barr), 472; *Hughes v. Hannibal & St. J. R. Co.*, 1877, 66 Missouri, 325; *St. Louis, etc. R. Co. v. Ferguson*, 1892, 57 Arkansas, 16. And see *Valentine, J.*, in *U. P. R. Co. v. Rollins*, 1869, 5 Kansas, 167, pp. 177, 178.

There are cases where railroad companies have been held liable for the death or maiming of animals alleged to have been attracted to the railroad track by such substances as salt, cottonseed, or molasses, which the company allowed to be placed in an accessible situation, and which were permitted to remain so exposed for a considerable time. *Crafton v. H. & St. J. R. Co.*, 1874, 55 Missouri, 580; *Morrow v. H. & St. J. R. Co.*, 1888, 29 Missouri Appeals, 432; *Page v. N. C. R. Co.*, 1874, 71 Nor. Car. 222; *Railway v. Dick*, 1889, 52 Arkansas, 402. But in none of these cases was the death of the animal directly due to eating the substances thus exposed. In every case the animal was killed or crippled by force actively brought to bear upon it by the railroad company in the management of the trains. And it would seem that there was, in one or more of the cases, fair reason to hold the company on the ground that this active force was negligently exerted. Having done something which they had reason to believe would attract animals to a particular part of the track, it may plausibly be argued that the railroad employees should have been on the lookout for their presence, and are liable for a collision if they could have avoided it by seasonably obtaining knowledge of the presence of the animals. This would certainly be so in States where the landowner is held to be under a duty, when setting force in motion, to

The child, it is said, is incapable of protecting itself; and hence it is eloquently contended that the law must impose the duty of protection upon landowners. The apparent assumption is, that all the children in the world are mere waifs and strays, and that the duty of caring for them must be imposed upon the landowners because the law can find no one else to bear the burden.<sup>1</sup> The fact is, that the vast majority of children have protectors appointed alike by nature and by law, viz., their parents, who have legal power to control their actions, and whose moral duty to keep their children from entering upon dangerous premises is generally regarded as at least equal to the moral obligation of the landowner to fence them out. If the child, upon entering on the premises, is hurt by the "active negligence" of the owner in bringing force to bear upon him, it may well be that the negligence of the parent in failing to restrain the child's entrance does not bar the child's recovery for the force thus brought to bear upon him after his

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use reasonable care to discover trespassers. And even in States where that duty is not generally recognized, an exception might be allowed in cases where the landowner knows that his own acts are likely to attract animals to a particular spot. Unquestionably the *language* used in some of these opinions tends to favor the claim of the child against the landowner in the hypothetical case under discussion in this article. Looking, however, to the point actually *decided*, these cases do not establish the liability of the landowner for harm suffered by an animal's bringing itself in contact with "attractive" substances on the land; but only for harm done by the landowner's bringing force actively to bear upon the animal. It should be added that, even in States adopting the foregoing decisions, it would seem that the railroad company are not liable by reason of the attractiveness of the substances exposed, if such exposure took place in the reasonable and usual course of business, and was not continued for an unnecessary time. Thus it is a justification for the railroad company that the salt which attracted the animals was used in thawing out switches, if such use was necessary to the proper operation of the road. *Louisville, etc. R. Co. v. Phillips*, 1893, Mississippi; s. c. 12 Southern Rep. 825; *Kirk v. Norfolk, etc. R. Co.*, 1896, 41 West Va. 722. And see *Schooling v. St. L. etc. R. Co.*, 1882, 75 Missouri, 518.

<sup>1</sup> See, for instance the language of Mr. Justice Agnew in *Hydraulic Works Co. v. Orr*, 1877, 83 Pa. State, 332, p. 336. ". . . the mind, impelled by the instinct of the heart, sees at once that in such a place, and under these circumstances, he" (the landowner) "had good reason to expect that one day or other some one, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow. . . . Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child. . . . The common feeling of mankind, guided by the sacred heart of the great law of love, and the common-sense of jurors, must be left, in such a case, to pronounce upon the facts."

It will be noticed that, in the above passage, there is no suggestion that there is any person other than the landowner upon whom the law imposes the slightest responsibility for the child's safety; much less that there is another person who is primarily responsible therefor.



entrance. But it is going far beyond this to say that the child can recover for harm sustained by him through the condition of the premises, without the immediate intervention of any human agency save his own.<sup>1</sup> When a child wakes up in the morning in his father's house, the duty of providing a safe playground for him during the day rests upon his parents. Is this duty shifted from the parent to private landowners because the child chances to escape from the parent's care?<sup>2</sup> If those who brought the child into the world are unable, by reason of poverty, to provide him a playground, this may afford an argument for the passage of a statute imposing that duty upon the municipality, in which case each landowner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate landowner the entire damage arising from the want of such a playground.<sup>3</sup>

Even if it be conceded that the child cannot maintain a civil action against his parents to recover damages for their neglect to guard him from harm,<sup>4</sup> still the parental duty, created by nature, and certainly recognized to some extent by law, cannot be ignored in determining whether to impose a legally enforceable duty upon landowners to keep their premises in safe condition for the entrance of uninvited children. If it be urged that children are so largely guided by sudden impulse that it is impossible for parents always effectually to protect them, two answers may be made: First, the parents can, in fact, protect the children in the great majority of instances. Second, if the duty is so impossible

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<sup>1</sup> "It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of premises should not be held liable to one who goes upon another's premises for his own uses, and sustains some injury by reason of the unfitness of the premises for such uses, not subsequently brought about by the active interference of the owner." Lurton, J., in *Felton v. Aubrey*, 1896, 74 Fed. Rep. 350, p. 359.

<sup>2</sup> See Allen, J., in *Clark v. Manchester*, 1882-1883, 62 N. H. 577, p. 580; and compare Finley, J., in *Missouri, etc. R. Co. v. Dobbins*, 1896, Texas, 40 S. W. R. 861, p. 864.

<sup>3</sup> "It is hard, no doubt, upon poor people who cannot afford to hire persons to look after their children and to keep them out of danger, that their little ones are exposed to more risk than those of others, but I cannot see that the burden of protecting such children should on that account be laid on the neighboring proprietors. . . ." Lord Justice Clerk Macdonald, in *Ross v. Keith*, 1888, 16 Scotch Session Cases, 4th Series, 86, p. 89.

<sup>4</sup> Upon the general subject of civil remedy by children vs. parent, for negligence, or for infringement of personal right, see 1 Beven on Negligence, 2d ed. 199-202; 4 Am. Law Rev. 410, 411, 413, 415; *Hewlett v. George, Ex'r of Ragsdale*, 1891, 68 Mississippi, 703; *Johnson, J., in Street R. Co. v. Eadie*, 1885, 43 Ohio State, 91, p. 98.



of performance that it would be a hardship to impose it upon the parents, it seems unfair to impose it upon the landowner, whose knowledge of the characteristics of any particular child cannot be equal to that possessed by its parents.<sup>1</sup> It is hardly too much to say that the doctrines enumerated in some cases, if carried to their logical conclusion, "would charge the duty of the protection of children upon every member of the community except their parents."<sup>2</sup>

The point now under consideration differs widely from the vexed question whether the concurring negligence of the parent should be held to bar the child's remedy against a confessedly negligent third person, e. g., one who carelessly collides with the child while the latter is in the custody of the negligent parent on a public highway. The question there is, whether a confessedly negligent defendant, whose negligence constitutes in part (at least) the legal cause of the child's damage, should be permitted to set up in defence to the child's action the contributory negligence of the parent. In that case it is conceded that a legal duty rested on the defendant, and that he failed to perform it. The only doubt in such a case is, whether he should be permitted to escape liability by reason of the concurring fault of the parent. But here the very question at issue is whether any duty rested upon the defendant; i. e., whether the law ought to impose a duty upon him. And in deciding that question it is fair to weigh the fact that the moral fault of the parent is, in a great majority of cases, one of the antecedents in the chain of causes leading up to the catastrophe.<sup>3</sup>

*Jeremiah Smith.*

[*To be continued.*]

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<sup>1</sup> According to some cases it would seem that the duty of the landowner to keep his premises in safe condition for the intrusion of children rises in proportion as the parents of those children neglect their own duties to their offspring. But "the mischievousness of children in a particular district and the absence of restraint on their proclivities seem somewhat peculiar grounds on which to raise a legal liability" of the above description. See 1 Beven on Negligence, 2d ed. 184, note 1.

<sup>2</sup> Paxson, J., in *Gillespie v. McGowan*, 1882, 100 Pa. State, 144, p. 151. See also Mitchell, J., in *Twist v. Winona R. Co.*, 1888, 39 Minn. 164, p. 167; and Finley, J., in *Missouri, etc. R. Co. v. Dobbins*, 1896, Texas, 40 S. W. R. 861, p. 864.

<sup>3</sup> It is also true in a large proportion of cases that the parent practically gets the pecuniary benefit of the judgment recovered in the name of the child or on behalf of the child's estate.

THE HISTORY OF TROVER.<sup>1</sup>

## II.

## REPLEVIN.

THE gist of the action of trespass *de bonis asportatis*, as we have seen, was a taking from the plaintiff's possession under a claim of dominion. The trespasser, like a disseisor, acquired a tortious property. Trespass, therefore, would not lie for a wrongful distress; for the distrainer did not claim nor acquire any property in the distress. This is shown by the fact that he could not maintain trespass or trover if the distress was taken from him on the way to the pound, or taken out of the pound,<sup>2</sup> but must resort to a writ of *rescous* in the one case, and a writ of *de parco fracto* in the other case. In these writs the property in the distress was either laid in the distrainee, or not laid in any one.<sup>3</sup>

But the distrainee, although debarred from bringing trespass, was not without remedy for a wrongful distress. From a very early period he could proceed against the distrainer by the action, which after a time came to be known as Replevin. This action was based upon a taking of the plaintiff's chattels and a detention of them against gage and pledge. Hence Britton and Fleta treat of this action under the heading "De Prises de Avers" and "De captione averiorum," while in Bracton and the *Mirror of Justices* the corresponding titles are "De vetito namio" and "Vee de Naam." In the first part of this paper it was shown that the action of replevin was originally confined to cases of taking by

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<sup>1</sup> Continued from page 289.

<sup>2</sup> "The distrainer neither gains a general nor a special property nor even the possession in the cattle or things distrained; he cannot maintain trover or trespass. . . . It is not like a pledgee, for he has a property for the time; and so of a bailment of goods to be redelivered, bailee shall have trespass against a stranger, because he is chargeable over." Per Parker, C. B., *Rex v. Cotton, Parker*, 113, 121. See also *Y. B.* 21 Hen. VII. f. 1, pl. 1; *Whitly v. Roberts, McClell. & Y.* 107, 108; 2 *Selw. N. P.* (1st ed.) 1362; 2 *Saund.* (6th ed.) 47 b, n. (c).

<sup>3</sup> "He shall not show in the writ to whom the property of the cattle doth appertain, unless he choose to do so." *Fitz. N. B.* 100. Compare *Bursen v. Martin*, *Cro. Jac.* 46, *Yelv.* 36, 1 *Brownl.* 192, s. c., in which case a count in trespass "*Quare equum cepit a persona querentis*" was adjudged bad for not alleging the horse to be "*suum.*"

way of distress,<sup>1</sup> but that in the reign of Edward III. it became a concurrent remedy with trespass. But the change was for centuries one of theory rather than of practice. In the four hundred years preceding this century there are stray *dicta*, but, it is believed, no reported decision that replevin would lie against any adverse taker but a distrainer.<sup>2</sup> We need not be surprised, therefore, at Blackstone's statement that replevin "obtains only in one instance of an unlawful taking, that of a wrongful distress."<sup>3</sup> Lord Redesdale, in *Shannon v. Shannon*,<sup>4</sup> dissented from this statement, saying that replevin would lie for any wrongful taking, and his opinion has been generally regarded as law.<sup>5</sup> But the attempt to extend the scope of the action so as to cover a wrongful detention without any previous taking was unsuccessful.<sup>6</sup> From what has been said, it is obvious that replevin has played a very small part in the history of trover, and we may therefore pass without more to the last and, for the purpose of the present essay, the most important of our four actions, the action of

## DETINUE.

The appeal, trespass, and replevin were actions *ex delicto*. Detinue, on the other hand, in its original form, was an action *ex contractu*, in the same sense that debt was a contractual action. It was founded on a bailment; that is, upon a delivery of a chattel to be redelivered.<sup>7</sup> The bailment might be at will or for a fixed term, or upon condition, as in the case of a pledge. The contractual nature of the action is shown in several ways.

In the first place the count must allege a bailment, and a traverse of this allegation was an answer to the action.<sup>8</sup>

<sup>1</sup> *Supra*, p. 287. See also 3 HARVARD LAW REVIEW, 31.

<sup>2</sup> See *Mellor v. Leather*, 1 E. & B. 619. Replevin against one, who took as finder, was allowed in *Taylor v. James*, Godb. 150, pl. 195.

<sup>3</sup> 3 Bl. Com. 146.

<sup>4</sup> 1 Sch. & Lef. 327.

<sup>5</sup> *George v. Chambers*, 11 M. & W. 149.

<sup>6</sup> *Mennie & Blake*, 6 E. & B. 847. In many jurisdictions in this country, however, with or without the aid of a statute, replevin became concurrent with detinue.

<sup>7</sup> A buyer could also bring detinue against the seller for the chattel sold but not delivered. But the position of the seller after the bargain was essentially that of a bailee. For an early case of detinue by a buyer, see *Sel. Pl. Man. Cts.*, 2 *Seld. Soc'y* (1275), 138. The count for such a case is given in *Nova Narrationes*, f. 68. See also *Y. B.* 21 Ed. III. f. 12, pl. 2.

<sup>8</sup> *Y. B.* 3 Ed. II. 78; *Y. B.* 6 Ed. II. 192. Compare *Y. B.* 20 & 21 Ed. I. 193. After the scope of detinue was enlarged, a traverse of the bailment became an immaterial traverse. *Gledstone v. Hewitt*, 1 Cr. & J. 565; *Whitehead v. Harrison*, 6 Q. B. 423, in which case the court pointed out a serious objection to the modern rule.



Again, detainee could not be maintained against a widow in possession of a chattel bailed to her during her marriage, because "ele ne se peut obliger."<sup>1</sup> Nor, for the same reason, would the action lie against husband and wife on a bailment to them both.<sup>2</sup> Thirdly, on a bailment to two or more persons, all must be joined as defendants, for all were parties to the contract.<sup>3</sup> On the same principle, all who joined in bailing a chattel must be joined as plaintiffs in detainee.<sup>4</sup> On the other hand, on the bailment by one person of a thing belonging to several, the sole bailor was the proper plaintiff.<sup>5</sup> For it was not necessary in detainee upon a bailment, as it was in replevin and trespass, to allege that the chattels detained were the "goods of the plaintiff."<sup>6</sup> Fourthly, the gist of the action of detainee was a refusal to deliver up the chattel on the plaintiff's request; that is, a breach of contract. Inability to redeliver was indeed urged in one case as an objection to the action, although the inability was due to the active misconduct of the defendant. "*Brown*. If you bail to me a thing which is wastable, as a tun of wine, and I perchance drink it up with other good fellows, you cannot have detainee, inasmuch as the wine is no longer *in rerum natura*, but you may have account before auditors, and the value shall be found." This, Newton, C. J., denied, saying detainee was the proper remedy.<sup>7</sup> It may be urged that the detainee in this case was founded upon a tort. But in truth the gist of the action was the refusal to deliver on request. This is brought out clearly by the case of *Wilkinson v. Verity*.<sup>8</sup> The defendant, a bailee, sold the chattel intrusted to his care. Eleven years after this conversion the bailor demanded the redelivery of the chattel, and upon the bailee's refusal obtained judgment against him on the breach of the contract, although the claim based upon the tort was barred by the Statute of Limitations. The breach of contract is obvious where the bailee was charged in detainee for a pure non-feasance, as where the goods were lost.<sup>9</sup> Fifthly, bailees were chargeable

<sup>1</sup> Y. B. 20 & 21 Ed. I. 189.

<sup>2</sup> Y. B. 38 Ed. III. f. 1, pl. 1; 1 Chitty Pl. (7th ed.) 104, 138.

<sup>3</sup> Y. B. 7 Hen. IV. f. 6, pl. 37.

<sup>4</sup> *Atwood v. Ernest*, 13 C. B. 881.

<sup>5</sup> Y. B. 8 Ed. II. 270; Y. B. 49 Ed. III. f. 13, pl. 6, because "they (the owners) were not parties to the contract and delivery;" *Bellewe, Det. Charters*, 13 R. II.

<sup>6</sup> *Whitehead v. Harrison*, 6 Q. B. 423, citing many precedents.

<sup>7</sup> Y. B. 20 Hen. VI. f. 16, pl. 2. To the same effect, 7 Ed. III., *Stath. Abr., Detainee*, pl. 9; Y. B. 17 Ed. III. f. 45, pl. 1; 20 Ed. III., *Fitz. Abr. Office del Court*, 22.

<sup>8</sup> L. R. 6 C. P. 206; *Ganley v. Troy Bank*, 98 N. Y. 487, accord.

<sup>9</sup> *Reeve v. Palmer*, 5 C. B. N. S. 84. The early authorities are cited by Professor Beale in 11 HARVARD LAW REVIEW, 160, 161.

in *assumpsit*, after that action had become the common remedy for the breach of parol contracts.<sup>1</sup>

Finally, we find, as the most striking illustration of the contractual nature of the bailment, the rule of the old Teutonic law that a bailor could not maintain *detinue* against any one but the bailee. If the bailee bailed or sold the goods, or lost possession of them against his will, the sub-bailee, the purchaser, and even the thief, were secure from attack by the bailor. This doctrine maintained itself with great persistency in Germany and France.<sup>2</sup> In England the ancient tradition was recognized in the fourteenth century. In 1351 Thorpe (a judge three years later) said: "I cannot recover against any one except him to whom the charter was bailed."<sup>3</sup> Belknap (afterwards Chief Justice) said in 1370: "In the lifetime of the bailee *detinue* is not given against any one except the bailee, for he is chargeable for life."<sup>4</sup> Whether it was ever the law of England that the bailor was without remedy, if the bailee died in possession of the chattel, must be left an open question.<sup>5</sup> In a case of the year 1323 it was generally agreed that the executor of a bailee was liable in *detinue*.<sup>6</sup> But the plaintiff in that case, who alleged a bailment of a deed to A, and that the deed came to the hands of the defendant after A's death, and that defendant refused to deliver on request, failed because he did not make the defendant privy to A as heir or executor. Afterwards, however, the law changed, and it was good form to count of a bailment to A, and a general *devenuerunt ad manus* of the defendant after A's death.<sup>7</sup> Belknap's statement also ceased to be law, and *detinue*

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<sup>1</sup> *Wheatley v. Lowe*, Palm. 28; Cro. Jac. 668, s. c. See 2 HARVARD LAW REVIEW, 5, 6.

<sup>2</sup> Heusler, *Die Gewere*, 487; Carlin, *Niemand kann auf einen Anderen mehr Recht übertragen als er selbst hat*, 42, 48; Jobbé-Duval, *La Revendication des Meubles*, 80, 165.

<sup>3</sup> Y. B. 24 Ed. III. f. 41, A, pl. 22.

<sup>4</sup> Y. B. 43 Ed. III. f. 29, pl. 11.

<sup>5</sup> In *Sel. Cas. in Ch.*, 10 *Seld. Soc'y*, No. 116, a plaintiff, before going to Jerusalem, had bailed a coffer containing title deeds and money to his mother. The mother died during his absence, and her husband, the plaintiff's stepfather, refused to give up the coffer to the son on his return. The plaintiff brought his bill in chancery alleging that "because he [stepfather] was not privy or party to the delivery of the coffer to the wife no action is maintainable at common law, to the grievous damage," etc., "if he be not succoured by your most gracious lordship where the common law fails him in this case." See also Y. B. 20 & 21 Ed. I. 189.

<sup>6</sup> Y. B. 16 Ed. II. 490.

<sup>7</sup> Y. B. 29 Ed. III. 38, B, per Wilby, J.; Y. B. 9 Hen. V. f. 14, pl. 22; Y. B. 9 Hen. VI. f. 58, pl. 4. Paston, J. "The count is good enough notwithstanding he does

was allowed in the lifetime of the bailee against any one in possession of the chattel.<sup>1</sup> In other words, the transformation in the manner just described, of the bailor's restricted right against the bailee alone, to an unrestricted right against any possessor of the chattel bailed, virtually converted his right *ex contractu* into a right *in rem*.

It is interesting to compare this transformation with the extension at a later period of the right of the *cestuy que trust*. In the early days of uses the *cestuy que use* could not enforce the use against any one but the original feoffee to uses. In 1482 Hussey, C. J., said: "When I first came to court, thirty years ago, it was agreed in a case by all the court that if a man had enfeoffed another in trust, if the latter died seised so that his heir was in by descent, that then no *subpœna* would lie."<sup>2</sup> Similarly, the husband or wife of the feoffee to uses were not bound by the use.<sup>3</sup> Nor was there at first any remedy against the grantee of the feoffee to uses although he was a volunteer, or took with notice of the use, because as Frowicke, C. J., said, "The confidence which the feoffor put in the person of his feoffee cannot descend to his heir nor pass to the feoffee of the feoffee, but the latter is feoffee to his own use, as the law was taken until the time of Henry IV. [VI.]."<sup>4</sup> One is struck by the resemblance between this remark of the English judge and the German proverb about bailors: "Where one has put his trust, there must he seek it again."<sup>5</sup> The limitation of the bailor at common law, and the *cestui que trust* in equity, to an action or suit against the original bailee or trustee, are but two illustrations of one characteristic of primitive law, the inability to create an obligation without the actual agreement of the party to be charged.<sup>6</sup>

not show how the deed came to defendant, since he has shown a bailment to B (original bailee) at one time." Martin, J. "He ought to show how it came to defendant." Paston, J. "No, for it may be defendant found the deed, and if what you say is law, twenty records in this court will be reversed."

<sup>1</sup> Y. B. 11 Hen. IV. f. 46, B, pl. 20; Y. B. 12 Ed. IV. f. 11, pl. 2, and f. 14, pl. 14; Y. B. 10 Hen. VII. f. 7, pl. 14.

<sup>2</sup> Y. B. 22 Ed. IV. f. 6, pl. 22. In Keilw. 42, pl. 7, Vavasour, J., said, in 1501, that the subpœna was never allowed against the heir until the time of Henry VI., and that the law on this point was changed by Fortescue, C. J.

<sup>3</sup> Ames, Cases on Trusts (2d ed.), 374, n.

<sup>4</sup> Anon., Keilw. 46, pl. 7. See also Ames, Cases on Trusts (2d ed.), 282-285.

<sup>5</sup> Wo man seinen Glauben gelassen hat, da muss man ihn wieder suchen.

<sup>6</sup> This same inability explains the late development of assumpsit upon promises implied in fact, and of quasi-contracts. The necessity of the invention of the writ *quare ejecit infra terminum* as a remedy for a termor, who had been ousted by his landlord's vendee, was due to this same primitive conception, for the vendee was not chargeable by the landlord's contract.



A trust, as every one knows, has been enforceable for centuries against any holder of the title except a purchaser for value without notice. But this exception shows that the *cestui que trust*, unlike the bailor, has not acquired a right *in rem*. This distinction is, of course, due to the fundamental difference between common-law and equity procedure. The common law acts *in rem*. The judgment in detinue is, accordingly, that the plaintiff recover the chattel, or its value. Conceivably the common-law judges might have refused to allow the bailor to recover in detinue against a *bona fide* purchaser, as they did refuse it against a purchaser in market overt. But this would have involved a weighing of ethical considerations altogether foreign to the medieval mode of thought. Practically there was no middle ground between restricting the bailor to an action against his bailee, and giving him a right against any possessor. Equity, on the other hand, acts only *in personam*, never decreeing that a plaintiff recover a *res*, but that the defendant surrender what in justice he cannot keep. A decree against a *mala fide* purchaser or a volunteer is obviously just; but a decree against an innocent purchaser, who has acquired the legal title to the *res*, would be as obviously unjust.

In all the cases of detinue thus far considered the action was brought by a bailor, either against the bailee or some subsequent possessor. We have now to consider the extension of detinue to cases where there was no bailment. Legal proceedings for the recovery of chattels lost were taken, in the earliest reported cases, in the popular courts. The common case was doubtless that of an animal taken as an estray by the lord of a franchise. If the lord made due proclamation of the estray, and no one claimed it for a year and a day, the lord was entitled to it. But within the year and day the loser might claim it, and if he produced a sufficient *secta*, or body of witnesses, to swear to his ownership or loss of the animal, it was customary for the lord to give it up, upon the owner's paying him for its keep, and giving pledges to restore it in case of any claim for the same animal being made within the year and day.<sup>1</sup> There is an interesting case of the year 1234, in which after the estray had been delivered to the claimant upon his making proof and

<sup>1</sup> Sel. Pl. Man. Cts., 2 Seld. Soc'y (1281), 31. "Maud, widow of Reginald of Charlton, has sufficiently proved that a certain sheep (an estray) valued at 8*d.* is hers, and binds herself to restore it or its price in case it shall be demanded from her within year and day; pledges John Ironmonger and John Roberd; and she gives the lord 3*d.* for his custody of it." There is a similar case in the Court Baron, 4 Seld. Soc'y (1324), 144.

giving pledges, another claimant appeared. It is to be inferred from the report that the second claimant finally won, as he produced the better *secta*.<sup>1</sup> If the lord, or other person in whose hands the estray or other lost chattel was found, refused to give it up to the claimant, the latter might count against the possessor for his *res adirata*, or *chose adirrée*, that is, his chattel gone from his hand without his consent;<sup>2</sup> or he might bring an appeal of larceny.<sup>3</sup> According to Bracton, the pursuer of a thief was allowed "rem suam petere ut adiratam per testimonium proborum hominum et si consequi rem suam quamvis furatam."<sup>4</sup> This statement of Bracton, taken by itself, would warrant the belief that the successful plaintiff in the action for a *chose adirrée* had judgment for the recovery of the chattel. This may have been the fact; but it is difficult to believe that such a judgment was given in the popular court. No intimation of such a judgment is to be found in any of the earlier cases. It seems probable that Bracton meant simply that the plaintiff might formally demand his chattel in court as *adiratum*, and, by the defendant's compliance with the demand, recover it. For, in the sentence immediately following, Bracton adds that if the defendant will not comply with his demand, — "si . . . in hoc ei non obtemperaverit," — the plaintiff may proceed further and charge him as a thief by an appeal of larceny. This change from the one action to the other is illustrated by a case of the year 1233.<sup>5</sup> The count for a *chose adirrée* is described in an early Year Book.<sup>6</sup> The

<sup>1</sup> 3 Bract. Note Book, No. 1115.

<sup>2</sup> *Adiratus* is doubtless a corruption of *adextratus*, i. e., out of hand. In the precedents of trover and detinue sur trover in Coke's Entries, the plaintiff alleged that he casually lost the chattel "extra manus et possessionem." Co. Ent. 38, pl. 31; 40, pl. 32; 169, d, pl. 2.

<sup>3</sup> "And if the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirrée*), in form of trespass, or an appeal of larceny by words of felony." Britton, f. 27. See also Britton, f. 46.

<sup>4</sup> Bract. 150 b. See also Fleta, 55, 63.

<sup>5</sup> 2 Bract. Note Book, No. 824. The plaintiff "dixit quod idem Willelmus in pace dei et Dom. Regis et ballivorum injuste detinuit ei tres porcos qui ei fuerunt addirati, et inde producit sectam quod porci sui fuerunt et ei porcellati et postea addirati." William disputed the claim, and the plaintiff then charged William as a thief "et parata fuit hoc disracionare versus eum, sicut femina versus latronem, quod legale catallum suum nequiter ei contradixit."

<sup>6</sup> 20 Ed. I. 466. "Note that where a thing belonging to a man is lost (*endire*), he may count that he (the finder) tortiously detains it, etc., and tortiously for this that whereas he lost (*ly fut endire*) the said thing on such a day, etc., he (the loser) on such a day, etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law (his own hand the twelfth) that he lost the thing."

latest recognition of this action that has been found is a precedent in *Novae Narrationes*, f. 65, which is sufficiently interesting to be reproduced here in its original form.

*De Chyval Dedit.*

Ceo vous monstre W. &c. que lou il avoit un son chival de tiel colour price de taunt, tiel jour an et lieu, la luy fyst cel cheval dedire [adirré], et il alla querant dun lieu en autre, et luy fist demander en monstre fayre & marche et de son chival ne poet este acerte, ne poet oier tanquam a tiel jour quil vient et trova son cheval en la garde W. de C. que illonques est s. en la gard mesme cesty W. en mesme la ville, et luy dit coment son chival fuit luy aderere et sur ceo amena suffisantz proves de prover le dit chival estre son, devant les baylliefz et les gentes de la ville, & luy pria qui luy fist deliveraunce, et il ceo faire ne voyleit ne uncore voet, a tort et as damages le dit W. de XX. s. Et sil voet dedire &c. [vous avez cy &c. que ent ad suit bon].

This count points rather to damages than to the recovery of the horse. It is worthy of note, also, that its place in the "*Novae Narrationes*" is not with the precedents in *detinue*, but with those in *trespass*. There seems to be no evidence of an action of *chose adirrée* in the royal courts. Nor has any instance been found in these courts of *detinue* by a loser against a finder prior to 1371.<sup>1</sup> In that year a plaintiff brought *detinue* for an ass, alleging that it had strayed from him to the seignory of the defendant, and that he one month afterwards offered the defendant reasonable satisfaction (for the keep). Issue was joined upon the reasonableness of the tender.<sup>2</sup> *Detinue* by a loser against a finder would probably have come into use much earlier but for the fact, pointed out in the first part of this paper, that the loser might bring *trespass* against a finder who refused to restore the chattel on request. Indeed, in 1455,<sup>3</sup> where a bailiff alleged simply his possession, and that the charters came to the defendant by finding, *Prisot*, C. J., while admitting that a bailor might have *detinue* against any possessor of goods lost by the bailee, expressed the opinion that where there was no bailment the loser should not bring *detinue*, but *trespass*, if, on demand, the finder refused to give up the goods. Littleton

<sup>1</sup> In Y. B. 2 Ed. III. f. 2, pl. 5, there is this *dictum* by Scrope, J.: "If you had found a charter in the way, I should have a recovery against you by *præcipe quod reddat*."

<sup>2</sup> Y. B. 44 Ed. III. f. 14, pl. 30. See also 13 Rich. II., *Bellewe*, Det. of Chart. *Detinue* against husband and wife. Count that they found the charters.

<sup>3</sup> Y. B. 33 Hen. VI. f. 26, pl. 12.



insisted that detinue would lie, and his view afterwards prevailed. It was in this case that Littleton, in an aside, said: "This declaration *per inventionem* is a new-found Halliday; for the ancient declaration and entry has always been that the charters *ad manus et possessionem devenerunt* generally without showing how." Littleton was quite right on this point.<sup>1</sup> But the new fashion persisted, and detinue *sur trover* came to be the common mode of declaring whenever the plaintiff did not found the action upon a bailment to the defendant. In the first edition of "Liber Intrationum" (1510), f. 22, there is a count alleging that the plaintiff was possessed of a box of charters; that he casually lost it, so that it came to the hands and possession of the defendant by finding, and that he refused to give it up on request.<sup>2</sup> The close resemblance between this precedent and the earlier one from "Novae Narrationes" will have occurred to the learned reader. But there is one difference. In the count for a *chose adirrée*, it is the plaintiff who finds the chattel in the defendant's possession. In detinue *sur trover* the finding alleged is by the defendant. And until we have further evidence that the action in the popular courts was for the recovery of the chattel and not for damages only, it seems reasonable to believe that detinue *sur trover* in the king's courts was not borrowed from the action of *chose adirrée*, but was developed independently out of detinue upon a general *devenerunt ad manus*. But whatever question there may be on this point, no one can doubt that detinue *sur trover* was the parent of the modern action of trover.

Add to the precedent in the "Liber Intrationum" the single averment that the defendant converted the chattel to his own use, and we have the count in trover.

It remains to consider how the action of trover at first became concurrent with detinue, and then effectually supplanted it until its revival within the last fifty years.

There were certain instances in which detinue, in its enlarged scope, and trespass, did not adequately protect owners of chattels. Neither of these actions would serve, for instance, if a bailee or

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<sup>1</sup> Littleton's remark seems to have been misapprehended in 2 Pollock & Maitland, 174. The innovation was not in allowing detinue where there was no bailment, but in describing the defendant as a finder. The old practice was to allege simply that the goods came to the hands of the defendant, as in Y. B. 3 Hen. VI. f. 19, pl. 31. See also Isaac v. Clark, 1 Bulst. 128, 130. In 1655 it was objected to a count in trover and conversion that no finding was alleged, but only a *devenerunt ad manus*. The objection was overruled. Hudson v. Hudson, Latch, 214.

<sup>2</sup> A similar count in Lib. Int. f. 71.

other possessor misused the goods, whereby their value was diminished, but nevertheless delivered them to the owner on request. The owner's only remedy in such a case was a special action on the case. We find such an action in the reports as early as 1461,<sup>1</sup> the propriety of the action being taken for granted by both counsel and court.

If, again, after impairing the value of the goods, the bailee or other possessor refused to deliver them to the owner on request detinue would of course lie. But the judgment being that the plaintiff recover his goods or their value with damages for the detention,<sup>2</sup> if the defendant saw fit to restore the goods under the judgment, the plaintiff would still have to resort to a separate action on the case in order to recover damages for the injury to the goods. This was pointed out by Catesby in an early case,<sup>3</sup> and later by Serjeant Moore.<sup>4</sup> To prevent this multiplicity of actions, the plaintiff was allowed to bring an action on the case in the first instance, and recover his full damages in one action.

If a bailee destroyed the chattel bailed, the bailor, as we have seen, could recover its value in detinue. But if a possessor other than the owner's bailee destroyed the chattel, if, for instance, the tun of wine which Brown and his "*bons compagnons*" drank up, in the case already mentioned, had come to the hands of Brown in some other way than through bailment by the owner, it is at least doubtful if the owner could have recovered the value of the wine in detinue. Brown, in this case, never agreed with the owner to give up the wine on request. The plaintiff in detinue must therefore show a detention, which would be impossible of goods already destroyed. This was the view of Brian, C. J. This conservative judge went so far, indeed, as to deny the owner an action on the case under such circumstances, but on this latter point the other justices were "*in contraria opinione*."<sup>5</sup>

If case would lie against any possessor for misusing goods of another, and also against a possessor other than a bailee for the

<sup>1</sup> Y. B. 33. Hen. VI. f. 44, pl. 7. See also Y. B. 9 Hen. VI. f. 60, pl. 10; Y. B. 2 Ed. IV. f. 5, pl. 9, per Littleton; Y. B. 12 Ed. IV. f. 13, pl. 9; Rook v. Denny, 2 Leon. 192, pl. 242.

<sup>2</sup> See Williams v. Archer, 5 C. B. 318, for the form of judgment in detinue.

<sup>3</sup> Y. B. 18 Ed. IV. f. 23, pl. 5: "If I deliver my clothes to you to keep for me, and you wear them so that they are injured, I shall have an action of detinue, . . . and afterwards an action on the case for the loss sustained by your using the clothes."

<sup>4</sup> (1510) Keilw. 160, pl. 2.

<sup>5</sup> Y. B. 12 Ed. IV. f. 13, pl. 9. See also Y. B. 9 Ed. IV. f. 53, pl. 15, per Billing, J.

destruction of the goods, it was inevitable that it should finally be allowed against a bailee who had destroyed the goods. Such an action was brought against the bailee in a case of the year 1479,<sup>1</sup> which is noteworthy as being the earliest reported case in which a defendant was charged with "converting to his own use" the plaintiff's goods.<sup>2</sup> Choke, J., was in favor of the action. Brian, C. J., was against it. Choke's opinion prevailed.<sup>3</sup>

Later, a wrongful sale was treated as a conversion. In 1510 the judges said an action on the case would lie against a bailee who sold the goods because "he had misdemeaned himself."<sup>4</sup> In a word, trover became concurrent with detinue in all cases of misfeasance.

Trover also became concurrent with trespass. In 1601 the Court of King's Bench decided that trover would lie for a taking.<sup>5</sup> In the same year the Court of Common Pleas was equally divided on the question, but in 1604, in the same case, it was decided, one judge dissenting, that the plaintiff might have his election to bring trespass or case.<sup>6</sup> The Exchequer gave a similar decision in 1610.<sup>7</sup> In 1627, in *Kinaston v. Moore*,<sup>8</sup> "semble per all the Justices and Barons, . . . although he take it as a trespass, yet the other may charge him in an action upon the case in a trover if he will."

In all these cases the original taking was adverse. If, however, the original taking was not adverse, as where one took possession as a finder, a subsequent adverse holding, as by refusing to give up the goods to the owner on request, made the taker, according to the early authorities cited in the first part of this paper,<sup>9</sup> a trespasser *ab initio*. Trover was allowed against such a finder in 1586,

<sup>1</sup> Y. B. 18 Ed. IV. f. 23, pl. 5.

<sup>2</sup> The allegation of conversion occurs again in Y. B. 20 Hen. VII. f. 4, pl. 13; Y. B. 20 Hen. VII. f. 8, pl. 18; *Mounteagle v. Worcester* (1556), Dy. 121 a. The earliest precedents using the words "converted to his own use" are in Rastall's Entries, 4, d, pl. 1 (1547). Ibid. 8, pl. 1. In the reign of Elizabeth it was common form to count upon a finding and conversion.

<sup>3</sup> Y. B. 18 Ed. IV. f. 23, pl. 5; Y. B. 27 Hen. VIII. f. 25, pl. 3. "It is my election to bring the one action or the other, *i. e.*, detinue or action, on my case at my pleasure."

<sup>4</sup> Keilw. 160, pl. 2. To same effect, *Vandrink v. Archer*, 1 Leon. 221, a sale by a finder. The judges thought, however, that an innocent sale would not be conversion. But this *dictum* is overruled by the later authorities. *Consol. Co. v. Curtis*, '92, 1 Q. B. 495; 1 Ames & Smith, Cases on Torts, 328, 333, n. 4.

<sup>5</sup> *Basset v. Maynard*, 1 Roll. Ab. 105 (M), 5.

<sup>6</sup> *Bishop v. Montague*, Cro. El. 824, Cro. Jac. 50.

<sup>7</sup> *Leverson v. Kirk*, 1 Roll. Ab. 105 (M), 10.

<sup>8</sup> Cro. Car. 89.

<sup>9</sup> *Supra*, 288-289.



in *Eason v. Newman*,<sup>1</sup> Fenner, J., citing the opinion of Prisot, C. J., that the owner could maintain trespass in such a case.

That trover was allowed in *Eason v. Newman* as a substitute for trespass, and not as an alternative of detinue, is evident, when we find that for many years after this case trover was not allowed against a bailee who refused to deliver the chattel to the bailor on request. The bailee was never liable in trespass, but in detinue. In 1638, in *Holsworth's Case*,<sup>2</sup> an attempt to charge a bailee in trover for a wrongful detention was unsuccessful, as was a similar attempt nine years later in *Walker's Case*,<sup>3</sup> "because the defendant came to them by the plaintiff's own livery." A plaintiff failed in a similar case in 1650.<sup>4</sup> In the "*Compleat Attorney*,"<sup>5</sup> published in 1666, we read: "This action (trover) properly lies where the defendant hath found any of the plaintiff's goods and refuseth to deliver them upon demand; or where the defendant comes by the goods by the delivery of any other than the plaintiff." But in 1675, in *Sykes v. Wales*,<sup>6</sup> Windham, J., said: "And so trover lieth on bare demand and denial against the bailee."

By these decisions trover became concurrent with detinue in all cases, except against a bailee who could not deliver because he had carelessly lost the goods.<sup>7</sup> Indeed, trover in practice, by reason of its procedural advantages, superseded detinue until the present century.<sup>8</sup>

Although trover had now made the field of detinue and trespass its own, there was yet one more conquest to be made. Trespass, as the learned reader will remember, would not lie, originally, for a wrongful distress, the taking in such a case not being in the nature of a disseisin. In time, however, trespass became concurrent with replevin. History repeats itself in this respect, in the development of trover. In *Dee v. Bacon*,<sup>9</sup> the defendant pleaded to an action of trover that he took the goods damage feasant. The plea was adjudged bad as being an argumentative denial of the conver-

<sup>1</sup> Goldesb. 152, pl. 79; Cro. El. 495, s. c.

<sup>2</sup> Clayt. 57, pl. 99.

<sup>3</sup> *Strafford v. Pell*, Clayt. 151, pl. 276.

<sup>4</sup> 3 Keb. 282. See also *Scot and Manby's Case* (1664), 1 Keb. 449, per Bridgman.

<sup>7</sup> Even here the bailee was chargeable in case, *i. e.* *assumpsit*.

<sup>8</sup> In 1833, the defendant in detinue lost his right to defend by wager of law, and by the Common Law Procedure Act of 1854, c. 78, the plaintiff gained the right to an order for the specific delivery of the chattel detained. Under the influence of these statutory changes, detinue has regained some of its lost ground.

<sup>9</sup> Cro. El. 435.

<sup>5</sup> Clayt. 127, pl. 227.

<sup>6</sup> p. 86.

sion. *Salter v. Butler*<sup>1</sup> and *Agars v. Lisle*<sup>2</sup> were similar decisions, because, as was said in the last case, "a distress is no conversion." The same doctrine was held a century later in two cases in *Bunbury*. But in 1770, in *Tinkler v. Poole*,<sup>3</sup> these two cases, which simply followed the earlier precedents, were characterized by Lord Mansfield as "very loose notes," and ever since that case it has been generally agreed that a wrongful distress is a conversion.<sup>4</sup>

This last step being taken, trover became theoretically concurrent with all of our four actions, appeal of larceny, trespass, detinue, and replevin, and in practice the common remedy in all cases of asportation or detention of chattels or of their misuse or destruction by a defendant in possession. The career of trover in the field of torts is matched only by that of assumpsit, the other specialized form of action on the case, in the domain of contract.

The parallel between trover and assumpsit holds good not only in the success with which they took the place of other common-law actions, but also in their usurpation, in certain cases, of the function of bills in equity. A defendant who has acquired the legal title to the plaintiff's property by fraud or duress, is properly described as a constructive trustee for the plaintiff. And yet if the *res* so acquired is money, the plaintiff may have an action of assumpsit for money had and received to his use; and if the *res* is a chattel other than money, the plaintiff is allowed, at least in this country, to sue the defendant in trover.<sup>5</sup> In some cases, indeed, an express trustee is chargeable in trover, as where an indorsee for collection refuses to give back the bill or note to the indorser. Lord Hardwicke, it is true, had grave doubts as to the admissibility of trover in such a case;<sup>6</sup> but Lord Eldon reluctantly recognized the innovation.<sup>7</sup> This innovation, it should never be forgotten, was a usurpation. Trover as a substitute for a bill in equity is, and always must be, an anomaly.

J. B. Ames.

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<sup>1</sup> Noy, 46.

<sup>2</sup> Hutt. 10.

<sup>3</sup> 5 Burr. 2657.

<sup>4</sup> 1 Ames & Smith, Cases on Torts, 274, n. 3.

<sup>5</sup> *Thurston v. Blanchard*, 22 Pick. 18; 1 Ames & Smith, Cases on Torts, 287, 288, n. 2.

<sup>6</sup> *Ex parte Dumas*, 2 Ves. 583.

<sup>7</sup> *Ex parte Pease*, 19 Ves. 46: "If the doctrine of those cases is right, in which the court has struggled upon equitable principles to support an action of trover, these bills might be recovered at law; but there is no doubt that they might be recovered by a bill in equity."

## NON-PUBLIC CORPORATIONS AND ULTRA VIRES.

IN the early days of corporations, when all charters represented special grants by the legislative power; when the beneficiaries of the franchise were supposed to be chosen because of their special fitness to exercise the powers and to enjoy the privileges conferred; when the acceptance of the charter by these beneficiaries imposed a corresponding duty towards the State and the public, — it was stated to be a universal rule that the assumption or usurpation of a power not expressly conferred by the charter or necessarily to be implied from it subjected the corporation to a forfeiture of its charter by an appropriate proceeding on the part of the State. At the present time, special charters are the rare exceptions. General laws permit the incorporation of companies and the reservation of all or any of the powers that are possessed by natural persons. Any persons, with unimportant qualifications, however unworthy, and irrespective of their fitness to perform the purposes of the company, may associate in corporate form. Articles of incorporation are perfunctorily executed, and when the fee is paid and the articles filed, the corporation is entitled to recognition, generally without any discretion to the appropriate public officials as to the acceptance of the articles. But the rule is still commonly declared to be universal that the exercise of power not reserved in the charter exposes the corporation to *quo warranto* by the Attorney-General and a judgment of ouster.

In considering the application of this principle of forfeiture, for the exercise of powers not reserved, to the case of strictly private corporations, it should be premised that the discussion can have no interest in those jurisdictions where, by statute, it is expressly provided that the penalty for a usurpation shall be forfeiture either by or without office found. Such provisions become express conditions of the grant itself, and exclude all questions of power or expediency. It should also be understood that the questions under discussion are limited to the cases of strictly private corporations, that is to say, commercial corporations that do not even have a *quasi* public character. In other words, it is intended to exclude from consider-



ation all corporations created to carry out purposes which concern the public at large, and from which purposes the corporation does not derive any direct material gain, as well as commercial corporations like railway, banking, water, and lighting companies, which, though formed for their own gain, have powers, in the proper performance of which the public at large has a direct actual interest. Whatever the rule applicable to these may be, there is a special reason in such cases for conceding to the State both the restrictive control (*scire facias*) and the destructive function (*quo warranto*).

It may also be admitted that even in the cases of these strictly private commercial corporations any act done in excess of powers granted or any omission of a duty imposed, which affects the public at large or offends the spirit of public policy (for other reasons than simply because it is an excess of power or omission of duty), or that unfits them for the performance of public duties, if such a condition be conceivable in the case of such corporations, should give the State the right to interfere. As commonly stated, however, the doctrine is not so restricted.

Even in a comparatively recent case,<sup>1</sup> a very learned judge says of corporate grants, in what must have been a very carefully considered opinion, that they are *always* assumed to have been made for the public benefit, and that any conduct which destroys their normal functions must so far disappoint the purpose of their creation as to affect, unfavorably, the public interest. As to this, it may be said, however, that in view of the actual circumstances under which, as has just been pointed out, charters are now obtained, it requires a vivid stretch of imagination or the invoking of an unusually ingenious legal fiction to make out the presumption that franchises are granted for the public benefit in those cases where the corporation is organized for gain and for no public purposes. Certainly the charter is not *sought* for the public benefit in the case of strictly commercial corporations, and if it is granted for that purpose it must be admitted that our legislatures omit even the simplest safeguards to effecuate that purpose. It is begging the whole question proposed to be discussed to say that because a usurpation of power is without authority, and because the authority granted represents the will of the State, such usurpation affects the interests of the public.

But we undoubtedly have to deal with this popular notion insist-

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<sup>1</sup> *People v. North River Co.*, 121 N. Y. 582.

ing that even though the power usurped do not involve any moral turpitude or *malum prohibitum*, and even though the act done be pursuant to the expressed consent of every stockholder, and without prejudice to the rights of creditors, the penalty is still involved, the power of forfeiture always implied. Recent decisions involving the exact question are, of course, rare. When directors, stockholders, and creditors are satisfied, the violation of law is not likely to be brought to the attention of the Attorney-General. On the other hand, it is to be remembered that in the earlier times, as suggested by Brice, this principle was upheld and strictly enforced because the needy sovereign wanted funds, and when he failed to get them in sufficient quantity from the normal channels, he found a ready and never-failing resource in wealthy corporations who would not buy their peace, and who could, without much difficulty, be convicted of some improper proceeding or other.

At the same time, it may be confidently stated that there is no decision in recent times which, on the precise questions involved in it, is authority in support of the power of the State to act in such a case, either to restrain the wrongful act or to punish by ouster. *Dicta* to that effect are numerous enough, but concurrently with these we find evidences of protest, direct and indirect, against such interposition.

In the first instance, it may be said that the development of the doctrine of *ultra vires*, in its application to the enforcement of contracts made in excess of power, shows such a protest. The earlier decisions, still adhered to in many jurisdictions and of the most respectable authority, hold that no action can be sustained upon such a contract or in the face of a prohibitory statute, and that there is no estoppel upon the defendant, whether the corporation be complaining or defending, against setting up the want of power or statutory prohibition.

"All contracts made by a corporation beyond the scope of those powers" (enumerated in the charter and those fairly incidental) "are unlawful and void, and no action can be maintained on them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. . . . A contract of a corporation which is *ultra vires* in the proper sense, that is to

say, outside the object of its creation as defined in the law of its organization, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."<sup>1</sup>

It will assist the consideration of this question of *ultra vires* to bear in mind one distinction, and that is, that there is nothing peculiar to corporation law about acts in contravention of public policy; that is to say, acts contrary to an express provision of law or contrary to the policy of express law, though not expressly prohibited or (otherwise) contrary to good morals. Such acts, when done by corporations, are unlawful and void, not because they are outside of the powers reserved by or granted to the particular corporation, but because they are unlawful by whomsoever done, whether by corporations or individuals. When, however, it is said<sup>2</sup> that public policy is concerned in the restriction of corporations within chartered limits, it may be urged that this is dragging this already too indefinite and therefore unsatisfactory expression (public policy) into an atmosphere too nebulous, even for something so essentially vague. The whole purpose of this discussion is to show that there is no such public policy involved in the case of non-public corporations. If the mere usurpation of power were against public policy in the sense in which this term is usually employed, any one participating in or contributing to the act would be wholly outside of the pale of the law, and we should not have the courts protesting that the plea must not be allowed to prevail when it would not advance justice. Certainly no such extenuation is made in favor of any other transactions forbidden by the policy of the law. As was said in *Whitney Arms Co. v. Barlow*,<sup>3</sup> "When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred," and which, therefore, shareholders can restrain, or for which they can call their directors to account, as for a breach of trust. "It seems to me far more accurate to say that the inability of such companies

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<sup>1</sup> *Central Transfer Co. v. Pullman Palace Car Co.*, 139 U. S. 24.

<sup>2</sup> See opinion of Judge Gray in *Leslie v. Lorillard*, 110 N. Y. 519.

<sup>3</sup> 63 N. Y. 61.



to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition making acts unlawful which, otherwise, they would have had a legal capacity to do." <sup>1</sup>

It is this distinction, showing the irrelevancy of the matter of public policy in cases of *ultra vires*, that presently leads the courts, even though, perhaps, unconsciously in some cases, to qualify the general rule as to the enforcement of contracts of corporations made beyond their powers. In this way we find the decisions first excepting the case of acts which, though within the powers granted, are performed for a purpose different from that prescribed by the terms of the charter. And as to such acts, it is said that if the party with whom the corporation deals does not know the purpose of the act, or does not know that it was not done for the purpose authorized by the charter, he shall have the same rights as if the purpose had been one for which the act was expressly authorized. And, in the same way, it is held that acts done by a corporation which presupposed the existence of other acts to make them *intra vires* are presumptive proofs that the latter acts, in fact, existed. When all is said, however, this is still giving validity to acts outside of the authority granted.

We then find a further development of the law arising out of the anxiety of courts to sustain agreements made outside of the corporate powers, but not in violation of any express statutory or charter provision. We are now told that a corporation is no longer the artificial being, "invisible, intangible, and existing only in contemplation of law,"—existing, if at all, only for the purposes of its creation, and not doing, in fact, what it cannot lawfully do. It is discovered that corporations permit torts, which, of course, is outside of their powers, that is to say, for which no authority has been conferred, but for which, in some way, responsibility must be located, punishment provided, and the injured party indemnified. Laws, too, are made for the punishment of crimes committed by corporations, although, of course, their charters do not authorize the commission of crimes.

Courts are called upon to deal with cases where *ultra vires* contracts are entered into and, as to the party dealing with the corporation, performed. The corporation has received certain ben-

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<sup>1</sup> Lord Selborne, in *Riche v. Ashbury Carriage Co.*, L. R. 7 H. L. 694.

efits, has refused to perform on its part, and when an action is brought against it on the contract it pleads the general issue or its equivalent in such a case that the attempt to make the contract in question failed because of lack of power in the corporation to make it. Such a state of things is, after a time, of course, found intolerable. As was said by Lord St. Leonards in *Hawkes v. Eastern Co.*,<sup>1</sup> "In my opinion, nothing can be more indecent than for a great company like this to allege, by way of defence, that a solemn contract which they have entered into is void on the ground of its not being within their powers." And yet all aboriginal notions about corporations precluded any remedy except *quo warranto* by the State. The more conservative courts insist, even at this late date, that the contract is void and unenforceable, but work out the money had and received or *quantum meruit* fiction so that justice may be done. In so doing, however, they recognize, as the true distinction in principle to be observed, that, if there be no wrong done to the public at large, the corporation must pay for what it has received; but that if there has been a so-called moral offence against the public, the inequitable advantage retained by the corporation in that relief is refused to the party who has dealt with it, unfortunate as such a condition may be, must yield to the higher consideration, and the public welfare must be vindicated as the supreme law. The State must hang the criminal even though the citizen lose his remedy; the lesser wrong must go unpunished that a public example may be made of the greater or more important wrong. "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, in permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."<sup>2</sup>

The next step was inevitable. The wrong of the corporation in making the contract in excess of its powers is no greater than

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<sup>1</sup> 1 De G., M. & G. 760.

<sup>2</sup> *Central Transport Co. v. Pullman Palace Car Co.*, *supra*.

that of the party with whom it deals, so far as he knows or is able to discover by a reference to the charter that the contract was unauthorized. "The doctrine of *ultra vires*," says the Supreme Court of the United States, "when invoked for *or against* a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."<sup>1</sup> "The plea of *ultra vires* should not, as a general rule, prevail whether interposed for or against a corporation when it would not advance justice, but, on the contrary, would accomplish a legal wrong."<sup>2</sup> And there is abundant authority to the effect that the ends of justice would be defeated by allowing the party contracting with a corporation outside of its powers to retain any advantage from the contract without compensation. The courts differ as to whether or not it is the contract or the fictitious obligation that should be sued upon to work out these ends of justice, but the ultimate result sought to be attained is always compensation for the precise advantage received. It is a corollary to this doctrine that so long as the contract remains wholly executory on both sides, that is, where nothing has been done to call for compensation, no rights can be predicated upon the agreement; and that when it is wholly performed on both sides, the rights acquired thereunder shall not be disturbed.

But throughout the entire field of decisions covering the transactions of corporations involving the usurpation of power there is recognized, as determining the minimum of power on the part of courts to regulate these transactions, the matter of the public interest. If the act be *malum in se*, it is because of some standard of public morality established by the Church, by the Legislature, or generally by the state of civilization of the particular community in which the question is raised. If no public interest be affronted or the public conscience be not shocked, if the directors consent and no stockholder seasonably interfere, the usurpation may lay the foundation of rights which courts will recognize and enforce. But if all stockholders consent, either by preliminary approval, or by ratification, or by acquiescence, and no public interest be directly involved, why should not such acts be tested by precisely the same principles as those applicable to the acts of natural persons? After all, the strictly private corpo-

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<sup>1</sup> *Ohio Company v. McCarthy*, 96 U. S. 258.

<sup>2</sup> *Whitney Arms Company v. Barlow*, 63 N. Y. 61.



ration with which, as distinguished from the public and semi-public corporations, we are alone occupying ourselves, is nothing but a combination of individuals, made for the purpose of conveniently combining capital, with perhaps a limited risk, and otherwise no different from an ordinary copartnership, except that it is protected against dissolution by the death of a member. Why, then, should it be governed by a system of rules different in any particular from those that apply to the cases of ordinary copartnerships? The fact that the liability of stockholders may be limited is no reason for a different standard of obligation because credit is given to corporations with a perfect understanding of this limitation, and because the same limitation is permitted and expressly provided for in the case of special partnerships. Of course it is proper to say that so far as a copartnership has power to restrict the scope of its business by the terms of the partnership articles, so similarly it is to be said that as between the stockholders themselves, or the stockholders and the corporation, no corporation should engage in any enterprise not contemplated by the corporate charter, if for no better or other reason than that it is right to assume that the stockholder would not have joined the venture if it had not been for the character of the charter; that is to say, if it had provided for purposes other than it enumerates. An investor might be willing to engage in a mercantile enterprise of one kind where he might be unwilling to invest his moneys if he were not certain that they could not be diverted to a business of an entirely different kind. Shares in the stock of a land company involve a totally different kind of risk from those of a manufacturing or trading company. And similarly it might be said that the creditor had some status to restrain the unauthorized act on the theory that credit was given with knowledge of the purposes of the corporation, and his judgment of its ability to meet obligations based upon such purposes. But where the stockholder and creditor are satisfied, or do not complain, why should not the contract of the land company, made with reference to the business of manufacturing and merchandising, be enforceable for all purposes just like the contracts of a partnership for the purchase of real estate, sanctioned by all the partners, even though the partnership articles expressly prohibit such an investment of the partnership funds? "A corporation is not an agent of the State or, in any strict sense, of the stockholders; but it derives its powers from the State, and it may transcend those powers for purposes which, in themselves

considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. . . . There is no statute or rule of the common law by which they become public offences."<sup>1</sup>

I apprehend, therefore, that this doctrine of *ultra vires*, so far as applied to strictly private enterprises, except in cases where the public interest is directly affected, and affected injuriously, and in the case of the *malum prohibitum* or *malum in se*, which has nothing about it peculiarly applicable to the case of corporation law, and except as objected to by the stockholders themselves, has no place in the law, and that it is an anachronism, developed at a period when conditions were wholly different, charters a special privilege with the *délectio personarum*, and born chiefly of the cupidity of rulers who found in the dissolution of corporations and their punishment for usurpation of powers a means for enriching their own needy purses. If the reason for the rule be obsolete, the rule itself should go; not alone from our decisions, but from the few statutes which make the usurpation the *malum prohibitum*. The State has no interest in such transgressions by such corporations. It is not surprising, therefore, to find the latest commentator on the subject speak of a "new and growing doctrine," according to which the question of usurpation of powers is one which cannot be raised between the corporation and a private party, or between private parties, but only by the State in a direct proceeding for punishment or forfeiture.<sup>2</sup> The learned author implies his protest in the caution that this principle, if allowed to prevail, will practically obliterate "the so-called doctrine of *ultra vires*."

This brings us, then, directly to the question of the propriety or right of proceedings on the part of the State, either by *scire facias* to restrain the assumption of rights, or by *quo warranto* to forfeit the charter. Both proceedings may be considered together, because both involve the same principle. If it be right for the State of its own motion, with no direct interest in the matter, to destroy the corporation guilty of a legal wrong, it is proper for it to seasonably interpose to prevent the consummation of the wrong. And if the State cannot destroy the corporation because upon no sound, legal

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<sup>1</sup> Comstock, J., in *Bissell v. Michigan Southern Co.*, 22 N. Y. 258.

<sup>2</sup> Thompson on Corporations, § 6033.

principle can any wrong be said to have been done to it, then the State has no justification to interfere at all, either by restraining or by punishing.

It may be admitted that in no case has it yet been directly decided that, even under the supposed circumstances, the State has not the power in question; although Judge Spencer, in so old a case even as *People v. Utica Ins. Co.*,<sup>1</sup> says that "many cases might be cited in which informations in the nature of *quo warranto* have been refused, where the right exercised was one of a private nature to the injury, only, of some individual. In the present case the right claimed by the defendants is in the nature of a public trust; they claim, as a corporation, the right of issuing notes," etc. But it appears to be equally true that no recent case can be found where the right under such conditions was sustained. In explanation of this, it may very properly be urged that as a practical question the State is not to be expected to assert its so-called sovereignty in cases of a purely private nature where no public interest is concerned. But the words of distinguished judges and learned commentators, with however little authority they may be speaking, are significant as to the soundness of the objection and the tendency of the courts.

We have seen how the doctrine of *ultra vires*, irrespective of the question of State interference, has developed or rather disintegrated. Of the original doctrine, that every act done outside of the powers expressly reserved or reasonably implied is of no effect whatever, there is nothing left except that the stockholder, and perhaps the creditor, by objecting in time can prevent the act, and that to the extent that an agreement has not been carried out it cannot be enforced except (no public interest being affected) to the extent that may be necessary to do justice between the parties. Indeed, it is not even certain that this much is left from the old rule, for we find the New York Court of Appeals<sup>2</sup> now holding that a corporation can, with the consent of its stockholders, usurp the power of executing accommodation paper from which the corporation receives no benefit. The court says, in effect, that it was no one's business, not even that of the corporation, so long as the stockholders, the beneficial owners of the property, by their conduct ratified the act. Out of this disintegration it is believed is springing the doctrine of non-interference on the part of the State.

<sup>1</sup> 15 Johns. 358.

<sup>2</sup> *Martin v. Niagara Falls Co.*, 122 N. Y. 165.



Little over fifty years ago the Supreme Court of the United States,<sup>1</sup> speaking through Justice Story, said, that a corporation, by the very nature of its political existence, is subject to a forfeiture of its corporate franchises for wilful mis-user or non-user. And in an earlier case<sup>2</sup> the same court declared this right of forfeiture to be the common law of the land and a tacit condition annexed to the creation of every private corporation. In one of the best considered of all the leading cases on corporation law,<sup>3</sup> it is said that even where the agreement, though *ultra vires*, is so free from offence against express law on public morals that, being partly executed by plaintiff, it would be enforced, the State might still annul the charter. "Did the question now made arise upon an application of the stockholders and incorporators to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation . . . or, on proceedings by the sovereign power to annul the charter . . . the rules of decision would be different from those which must prevail in the present action." And yet in that case the corporation had not a single public aspect, nor did the acts complained of directly affect a single public interest.

The limitations under discussion begin to be considered in connection with State proceedings against *quasi*-public corporations. "To establish it as a principle that no information can be granted in cases of what the counsel call private corporations might lead to very serious consequences."<sup>4</sup> But the serious character of the consequences is not made very plainly to appear. There is nothing but the matter of determining what is a private corporation. In *Attorney-General v. Petersburg R. R. Co.*,<sup>5</sup> Ruffin, C. J., says that with respect to the interest of the public in the performance of duties implied from the nature of the franchise granted "we should be inclined to allow that only such acts or omissions would be destructive of the charter as concern matters which are of the essence of the contract between the State and the corporation;" but that when the charter imposes a duty to be performed, "not merely to the citizen but to the sovereign itself," forfeiture may be adjudged.

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<sup>1</sup> *Mumma v. Potomac Co.*, 8 Pet. 287.

<sup>2</sup> *Terrett v. Taylor*, 9 Cranch, 43.

<sup>3</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 61.

<sup>4</sup> *Tilghman, C. J., in Com. v. Arrison*, 15 S. & R. 127.

<sup>5</sup> 6 Ired. L. 456.

Instead of the inevitable penalty, that is to say, instead of being a question of the arbitrary power of the State, it begins to be said that the wrong itself must be *so grave* as to require the application of the severe remedy by judgment of forfeiture, and that courts may *exercise their discretion* in deciding whether or not a corporation ought to be dissolved for doing unauthorized acts.<sup>1</sup> This consideration should be invoked to cover the cases of the corporations already referred to,<sup>2</sup> as not strictly public, in that they are not organized exclusively for the public welfare, but which, while organized for commercial purposes and for their own emolument, still exercise powers in which, by their very nature, the public has not only a potential but an actual and necessary interest. These are the commercial corporations which are organized, and generally obliged, to serve the public at large. In those cases in which the public interests are involved with private, the courts must exercise this so-called discretion in favor of the public interests. The powers exercised by such corporations, being public uses, are generally accompanied by the right to exercise the State's privilege of eminent domain, by which property is forcibly taken from its owners, and there is secured to such corporations a species of special privilege or monopoly which, in turn, subjects them to a special supervision or control to prevent an abuse of this high prerogative. As to such, "the power both of determination and enforcement is necessarily vested in State authority."<sup>3</sup>

This concession of discretion to the courts opens wide the door for the contention that has been urged. The power is no longer hard and fast; the wrong must be grave, and the courts may exercise their discretion. Can it be fairly said that the wrong is so grave against the public, appearing as complainant in the proceeding by their Attorney-General, when the public is not affected at all by the usurpation, and no direct injury has been done to the community at large, unless it be the unsubstantial one of the affront to its majesty by the violation of a duty which exists, if at all, only by fiction of law. "The State," says Justice Matthews, in *N. O. Co. v. Ellerman*,<sup>4</sup> "has a legal interest in preventing the usurpation and perversion of its franchises because it

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<sup>1</sup> See cases cited in Morawetz on Corporations, § 1028; Clark on Corporations, p. 237.

<sup>2</sup> See *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543.

<sup>3</sup> *Railroad Commrs. v. Portland Co.*, 63 Me. 269.

<sup>4</sup> 105 U. S. 166.

is a trustee of its powers for uses *strictly public*." Then may it not be said conversely that if the power usurped be a strictly private use, and not a public one at all, that the usurpation or perversion is only a private and not a public wrong, if any, and therefore no concern of the public or the State?

In *Bissell v. Mich. So. Co.*,<sup>1</sup> Selden, J., says that there is neither occasion for nor propriety in a resort to proceedings by *quo warranto* for any mere private purpose, and that nothing is hazarded in saying that such is not the nature of this proceeding. While this assertion is made for the purpose of declaring the doctrine that every assumption of corporate power is a wrong done to the public, the form of the assertion is significant at this early stage. The learned judge may be wrong in calling every usurpation a public offence, and right in restricting the office of *quo warranto* to the protection of public interests. He certainly is sound in pointing out, as he does, how ample for the protection of shareholders or other private interests are the ordinary equitable remedies.

Brice in his admirable work on *Ultra Vires*, in enumerating the instances in which the Attorney-General may sue, and after saying that he may, when a corporation has been created to carry out public objects and is doing acts prejudicial to such objects, or when it holds property for public purposes and is committing a breach of the trust involved, or when it is doing acts generally detrimental to the public welfare or hostile to public policies, adds: "Whether the cases can be considered to have laid down the principle that, wherever a corporation commits an *ultra vires* act, the Attorney-General may interfere, is perhaps doubtful. . . . It is, therefore, submitted that the wrongful act or misuse of powers to justify the interference of the Attorney-General must, in addition, concern the public." But he admits that there are "decisions, or at least *dicta*," which lend countenance to the right of the Attorney-General to proceed, even though no definite injury is shown or likely to be done to the public.

Cook in his work on *Stockholders*<sup>2</sup> says that the theory that corporations have no powers outside of the charter is no longer "strictly applied" to private corporations. "A private corporation may exercise many extraordinary powers, provided all of the stockholders assent and none of its creditors are injured. There

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<sup>1</sup> 22 N. Y. 289.

<sup>2</sup> § 3.



is no one to complain except the State, and the business being entirely private, the State does not interfere." That is perhaps not the same thing as saying that the State *cannot* interfere. The author cites no authority for this statement except *Kent v. Quicksilver Mining Co.*,<sup>1</sup> where Judge Folger says *obiter*, that a corporation may do acts not illegal *per se* or *malum prohibitum* (which we have seen to mean expressly prohibited), though there is want of power to do them. "They may be made good by the assent of stockholders so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance upon those acts." It was probably not meant that stockholders could confer powers not conferred by the charter, but that, by express assent, ratification, or laches, they could estop the corporation from asserting any lack of power. It is significant to note the further words of the court in speaking of the usurpation. "That was not a public evil: it was a wrong that affected private persons only, and one which they might assent to."

Thompson on Corporations, who writes of the present time, says<sup>2</sup> that the State will not interfere where no public question is involved. "In short, if the unauthorized acts affect merely the stockholders and creditors, and they have adequate legal or equitable remedies, the State will not interfere." It is to be noted that the learned author, like Cook (*supra*), does not say "cannot," but "will not," and he may be speaking of the practice of Attorneys-General rather than their powers. He might probably have gone so far as to say that when, *in such cases*, the power to enforce forfeiture is not expressly conferred by statute, the power does not exist.

Judge Putnam, in *Oliver v. Gilmore*,<sup>3</sup> in speaking of the non-user of powers, says that a corporation "instituted for private trading or manufacturing purposes and owing no special duty to the public, can ordinarily limit or entirely omit the exercise of its corporate powers, and is no more held than an individual to proceed at a pecuniary loss with its intended operations." This might be said to be coquetting with the "new and growing doctrine," although there is a substantial distinction between non-user and mis-user even in the case of private operations.

In *People v. North River Co.*, *supra*, where ouster was adjudged, Judge Finch points out the very essence of the decision

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<sup>1</sup> 78 N. Y. 159.

<sup>2</sup> § 6034.

<sup>3</sup> 52 Fed. Rep. 562.

when he says that, "to justify forfeiture of corporate existence, the State, as prosecutor, must show, on the part of the corporation accused, some sin against the law of its being which has produced or tends to produce injury to the public. The transgression must be such as to harm or menace the public generally, for the State does not concern itself with the quarrels of private litigants. It furnishes for them courts and remedies, but intervenes as a party only where some public interest requires its action."<sup>1</sup>

Finally, may it not be said that in the case of those commercial corporations which, in everything but form, are substantially ordinary trading partnerships, with power of succession, no one should be heard to complain of usurpation but creditors who are injured, or stockholders; that whether these complain or not, the State should not interfere, because in fact only private and not public interests are affected; that at least this should be so where charters are granted under general laws that would have permitted the power, that has been usurped, to have been originally reserved, if such had been the pleasure of the incorporators; and that, finally, the State should not be said to have a power which, if it did exist, should not be exercised. The purpose of this superficial discussion has not been so much to state the law as to anticipate its future; but it may, perhaps, be fairly said that enough has been pointed out from the books themselves to justify the prophecy.

*Jesse W. Lilienthal.*

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<sup>1</sup> *State v. Minnesota Co.*, 40 Minn. 213, acc. "Acts *ultra vires* are not necessarily a mis-user of franchises such as will warrant their forfeiture." And in *Leslie v. Lorillard*, *supra*, it was said that when corporations "act in excess of their powers, the question will be, is the act prohibited as prejudicial to some public interest, or is it an act not unlawful in that sense, but prejudicial to the stockholder."

## A RETRACTION.

IN the last volume of this magazine<sup>1</sup> I undertook to review a legal theory thus enounced by Prof. William A. Keener in a recent treatise: "No one shall be allowed to enrich himself unjustly at the expense of another."<sup>2</sup> Among the criticisms which I urged is one which, if true, is very vital, to the effect that the principle as defined contains within itself a logical fallacy, and here follows the substance of my argument:—

The proposition is exactly reproduced in meaning if it be cast into this form: The unjust enrichment of one at the expense of another is illegal. Now "it is generally conceded, and it is undoubtedly true, that the forum of the law is not of equal jurisdiction with the forum of the conscience, and that some acts may be ethically unjust which are yet permissible in law. Unjust acts may be therefore unjust and legal, or unjust and illegal. This difference may be indicated in our proposition, which will then take on either of these two forms:—

"1. The unjust and *legal* enrichment of one at the expense of another is illegal.

"2. The unjust and *illegal* enrichment of one at the expense of another is illegal."<sup>3</sup> Of these two propositions, the first is false in that it is a contradiction in terms; and the second is true, but useless in that it is a mere identity in terms.

Perhaps some rash opponent, on a sunny day when his courage is high, may answer, "True it is that some unjust acts may be legal and some illegal, but the only conclusion, with reference to the doctrine of unjust enrichment, that can rightly be drawn from the admission is that, so far as such unjust acts are acts of unjust enrichment, the doctrine is not true. It is an incorrect conclusion that the doctrine is itself logically defective. The difficulty is that you are not justified in the procedure which you have adopted, dividing, that is to say, acts of unjust enrichment into two classes, and then characterizing them in the subject by an adjective which Professor Keener had already reserved for, and retained in, the predicate. There can be no identity and no contradiction in one sentence unless the same adjective appears on both sides of the copula, with or without a negative attached. Such was not the case in Professor

<sup>1</sup> 10 HARVARD LAW REVIEW, 209, 479.

<sup>2</sup> Keener on Quasi-Contracts, 16.

<sup>3</sup> 10 HARVARD LAW REVIEW, 223.



Keener's original proposition, and such is not the case in your two derivative propositions, save and except as you have yourself made it so without his consent, so that the essence of what you did is to put words into his mouth which he did not use. Any proposition may be reduced to absurdity by that process. So simple a sentence as this, *All men must die*, must be thus converted into *All mortal men must die*, and so converted becomes a useless proposition, of course; but the process of conversion is itself illicit and in no wise affects the validity, logical or otherwise, of the original sentence. Consequently you were really guilty of the serious offence of first setting up a straw man, then knocking him down, and finally proclaiming that you thereby conquered a valiant and substantial foe."<sup>1</sup>

Alas, the criticism is only too true and too conclusive! It destroys my argument, and demolishes the whole superstructure thereon erected. I did set up a man of straw, and my apparent victory is mere emptiness. Whether the defeat of the real foe can be ultimately accomplished or not is another question, not now material. Suffice it for the present that my arguments have not yet brought it about.

In a realm where only truth is valued, — and the pages of this REVIEW are such a realm, — no mercy should be granted to error, especially when it takes the form of a criticism so fundamental, so elaborately urged, and so erroneous as was mine. A false argument leaves only one course open to him who would be a fair-minded critic, and that course I gladly follow. I admit my error, I retract, I tender a sincere apology to Professor Keener and to all others concerned, I resolve that it shall never with my consent occur again, and I make the retraction and apology as nearly as may be as public as the error. If anything more can be rightfully demanded, I trust to have grace to fulfil the obligation.

*Everett V. Abbott.*

NEW YORK, *December 17, 1897.*

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<sup>1</sup> This criticism is by no means, either in substance or in form, the criticism advanced by Mr. Hand in a recent number of the REVIEW. See his article, *Restitution or Unjust Enrichment*, Vol. XI. p. 249. Mr. Hand's article proceeds throughout upon certain fundamental misconceptions of my meaning, both in what I have to say about the doctrine of unjust enrichment and in what I have to say in the establishment and defence of the theory of restitution. To only one of the points which he makes can I allow any validity, and that by its own terms does not involve any matter of substance. I am informed, however, that, in the interest of the REVIEW, the editors feel it their duty to close that discussion for the present, and I may not now amplify my defence.

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MR. JUSTICE MCKENNA. — With the appointment and ratification by the Senate of Joseph McKenna as Justice of the Supreme Court of the United States to fill the place of Justice Field, resigned, the name of another Californian is added to the rolls of our highest tribunal. Justice McKenna's career and judicial character, now regarded with so much interest, are not entirely familiar to the legal profession in the East. He was educated and obtained his early legal training in California, where he first held public office as county district attorney. He then served in the legislature of that State; and was elected member of Congress for four successive terms till 1892, when he resigned to accept the appointment of United States Circuit Judge for California. This position he held till he became Attorney-General, only a few months previous to his present appointment. Although some of his judicial decisions have been very unfavorably criticised, Justice McKenna has always conducted himself impartially and for the best interests of his office. The unusual opposition to his appointment to the Supreme Bench may have been due, in part, to political and religious prejudice; but opposition and prejudice are now silenced, and the nation wishes Justice McKenna a long, successful, and useful career. He steps to a post of importance and honor, — one of the highest the nation can confer.

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THE SELDEN SOCIETY. — The programme of the Selden Society, as given out in a communication from its Secretary and Treasurer for the United States, Mr. Richard W. Hale, in "The Nation" of November 25th of last year, is of much interest to historical students of law, and in a lesser degree to lawyers generally. The volume for 1898 consists of extracts from the Records of the Court of Requests, and is edited by Mr. J. S. Leadam. This is the first time the history of this court, from its be-

ginning under Henry VII. to its extinction under Elizabeth and James I., on the ground that it was unconstitutional, has been written. The volume, consequently, must add substantially to our knowledge of sixteenth-century law. The recorded endeavors of this court to administer equity, and to remedy some of the more obvious deficiencies of the old common law, are sure to be found especially instructive.

For 1899 Mr. G. I. Turner is preparing a volume which will contain copious extracts from the rolls of the Forest Courts. The workings of the severe and complicated Forest Law, fashioned in the interest of the mediæval hunting kings, has hitherto been insufficiently explained, and Mr. Turner's book will throw light on an important and interesting subject. The Society also contemplates a volume of extracts from the records of the exchequer of the Jews. Its most noteworthy plan, however, is to mark the year 1900 by the experiment of placing in the hands of subscribers a portion of the Year Books. The scheme at present is to issue every other year a volume of the Year Books, which will thus alternate with volumes derived from other sources. It is proposed to begin at the earliest possible period, namely, with a new edition of the Year Books of Edward II., and to continue in regular order, but without trespassing on the field that Mr. Pike, in his editions of those Year Books of Edward III. not previously printed, is making his own. The text is to be based on the best manuscripts, and is to be accompanied by an English translation, and references to the plea rolls. The work is to be intrusted to Mr. F. W. Maitland and Mr. Turner. The success of the project, it is said, will depend largely on the opinion that is entertained of it in America; and if sufficient subscribers are attracted, it is proposed to accelerate the process of publication. Certainly, the Selden Society should not lack support in its effort to set before English and American readers, in a creditable and intelligible form, "the most distinctive monuments of the common law."

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ALLEN *v.* FLOOD. — The long-expected decision of the House of Lords in the case of *Allen v. Flood*, has been received in this country as well as in England with a degree of interest that it undoubtedly deserves. The case has been recently discussed in so many publications that it is perhaps unnecessary to recapitulate the facts. The point decided appears to be (so far as can be ascertained from the partial report in 4 Times L. R. 125) that an action will not lie against an individual defendant for causing the discharge of the plaintiff by the latter's employer, if the defendant has not committed, or caused to be committed, any act which would be of itself unlawful, without regard to the motive with which it might have been done. Apart from the great practical importance of the decision as a precedent in the numerous cases now arising with regard to trades unions, the reasoning of the majority in the House of Lords is of extraordinary interest as affecting the fundamental theory of the law of torts.

There is a view, more or less clearly set forth in the opinions of many judges and the writings of many legal authors, in both England and this country, that when a plaintiff has proved that the defendant has intentionally caused him to suffer pecuniary damage, he has shown a good cause of action, unless the defendant shows some ground of justification. A broad general privilege of every person to conduct his affairs as he chooses, and in particular to manage his business in whatever way seems



most profitable, is considered to furnish sufficient justification in almost all cases where the defendant has not made use of fraud, violence, or other means conceded to be illegal apart from the motives by which it may be directed. Where the question of the defendant's responsibility for his acts has been approached in this manner, however, it has almost always been declared, either by implication or by direct words, that this justification would not extend to cases where mere personal spite, or other wholly improper considerations, furnished the sole or predominant motives for the defendant's act. The presence of this gap in the whole range of acts of intentional infliction of damage, between the class of acts which are unlawful without regard to motive and those which are, in point of law, wholly justifiable and lawful, is what gives practical importance to this whole view of the theory of the law of torts. That there was such a gap, was expressly stated, not only by the Court of Appeal in the case under discussion, *Flood v. Jackson*, [1895] 2 Q. B. 21, and in *Temperton v. Russell*, [1893] 1 Q. B. 715, but also by several of the judges and law lords in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25, where the decision upon the facts of the case was in favor of the defendant. And the existence of such a gap has been assumed, if not expressly asserted, in a great number of American cases, extending from *Walker v. Cronin*, 107 Mass. 555, to the very recent case of *Oxley Slave Co. v. Hoskins* (see 56 Alb. Law Jour. 400).

Now the decision in *Allen v. Flood* seems to cut in back of the whole modern theory just stated, and render all discussion of what constitutes justification or privilege, outside of the cases of recognized affirmative defences, of little practical value. The majority distinctly lay down the proposition that an act which is not in itself unlawful apart from the motive of the person doing it, as falling within some of the ancient and tolerably well-defined classes of wrongful acts, cannot render a man liable to an action at law, however bad the motives on which he may have acted, and however serious the loss he may succeed in inflicting upon others. The existence of the gap above referred to, which admits of some acts being considered tortious on account of the bad motive accompanying them, is altogether denied. It may be maintained, of course, that this amounts to saying that the privilege of doing as one chooses sweeps back to the boundaries of fraud and violence. The court, however, do not so treat the question; they do not go into any question of justification, because they recognize no *prima facie* wrong.

That this doctrine of *Allen v. Flood* is simple, convenient in practice, and in accord with a conservative view of the spirit of the common law, seems almost undeniable. Though many will argue that it impairs the invaluable elasticity of the common law, and will keep out of the courts many cases in which the conditions of modern society demand judicial interference even though such interference may in some respects appear difficult and dangerous.

Radical as is the decision in *Allen v. Flood*, it leaves a loophole through which the doctrine that unjustifiable motives can be the determining element in a tort might, even in England, come back into the law. In that case there was no combination of several defendants to commit the acts complained of. It is expressly recognized, in at least two opinions, that the presence of an element of conspiracy might make a very material difference. If such an element can, as a matter of law, make that illegal which would not be illegal without it, all the questions as to

"malice" and unjustifiable motives can come before the courts in the same form as before, whenever there are several defendants. In England it appears to be likely that conspiracy will not be held to furnish a cause of action in any case where an action would not lie against a single defendant according to the doctrine of *Allen v. Flood*; to that effect, at any rate, is a decision in a court of the first instance, *Huttley v. Simmons*, 14 Times L. R. 150, following immediately after the announcement of the decision in the House of Lords. In this country there have been so many decisions holding defendants liable for what the courts consider malicious interference with the plaintiff's business, that it seems probable that the judges will pay little respect to *Allen v. Flood*, beyond distinguishing it as without the element of conspiracy which has been present in all the American cases, and hereafter giving more attention to this last point. The most satisfactory method of dealing with this whole subject, it may be suggested, is that now likely to be adopted in England, by simply making the more objectionable forms of boycotting criminal offences, and giving up all attempts to stretch the law of torts to cover cases lying outside of the clearly recognized classes of actionable wrongs.

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THE ANNULMENT OF A LOTTERY FRANCHISE. — Under authority conferred by acts of the Kentucky Legislature, the city of Frankfort, by written agreement, sold to one Stewart a lottery scheme devised by that municipality. One Douglas afterward acquired Stewart's right. Later, the Kentucky Legislature repealed the charter of the Frankfort lottery, and in the new Constitution of the State all lotteries were forbidden and all lottery privileges and charters previously granted were revoked. It was held by the Supreme Court of the United States that this constitutional provision, as applied to Douglas's claim of a lottery privilege, was not repugnant to that clause of the Constitution of the United States providing that no State shall pass laws impairing the obligation of contracts. In this case, *Douglas v. Kentucky*, 18 Sup. Ct. Rep. 119, Mr. Justice Harlan thus states the position of the court: "... we hold that a lottery grant is not, in any sense, a contract within the meaning of the Constitution of the United States, but is simply a gratuity and license which the State, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery; and that no right acquired during the life of the grant, on the faith of or by agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized."

This decision, which follows the well-known case of *Stone v. Mississippi*, 101 U. S. 814, clearly illustrates the present tendency of the courts to restrict within as narrow limits as possible the doctrine of *Dartmouth College v. Woodward*, 4 Wheat. 518. Surely in many respects this tendency is gratifying. In this very matter of lotteries alone, were it the law that a lottery grant is a contract which the State has no power to revoke, not only would the moral consequences be harmful to society, but there would also result a most serious weakening of governmental authority. In these lottery cases, indeed, there is involved a broad and fundamental question as to the true scope of legislative power. Unquestionably the so-called "police power" is a proper exercise of the legislative function; but the great difficulty has been to fix upon its true limits. Whatever be those limits as to



other matters, and whether or not *Dartmouth College v. Woodward* was decided correctly, it is certainly in accordance with sound legal principles to hold that the Legislature has no right to barter away its power to establish such rules as may be reasonably necessary from time to time for the protection of the public morals against the evils of lotteries. As was remarked by Mr. Chief Justice Waite, in *Stone v. Mississippi, supra*, referring to lotteries: "Certainly the right to suppress them is governmental, to be exercised at all times by those in power at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. He has in legal effect nothing more than a license. . . ."

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A NEW TRIAL FOR BRAM.—The Supreme Court of the United States has granted a new trial to Bram, first mate of the barkentine "Herbert Fuller," who was convicted a year ago of the murder of Captain Nash on the high seas. *Bram v. United States*, 18 Sup. Ct. Rep. 183. It will be remembered that after the murder the vessel put into the port of Halifax. Bram was taken into custody immediately upon landing, and was soon afterwards sent for by a police detective. At the detective's office he was stripped and searched; and in the course of the search a conversation took place which the detective described at the trial as follows:—

"When Mr. Bram came into my office I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said, 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said, 'He could not have seen me. Where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now, look here, Bram, I am satisfied that you killed the Captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.'"

The detective stated at the trial that no influence on his part was exerted to persuade Bram one way or the other. His testimony as to Bram's answers was admitted; and because of its admission the Supreme Court has ordered a new trial.

A defendant is protected from having his own statements produced against him when they were induced by duress or promise of favor as touching the case on the part of one having authority in that respect; and the question to be considered is whether in the present case this rule can be applied. No threat or promise of favor was directly expressed by the detective's words. The only remark to which such a meaning could have been attributed was, "If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders." These words, however, are addressed merely to the moral sense; they offer no advantage, except perhaps a moral one. They make no threat; and they could hardly have been thought to do so even by the courts which decided the extreme cases early in this century. *Rex v. Thornton*, 1 Moo. C. C. 27.



The majority of the court, however, conceding that the strict meaning of the detective's words was neither to threaten nor to promise, finds in the circumstances of the case enough to warrant the conclusion that Bram was unduly influenced. While it may be presumptuous to dispute the correctness of this view, it seems that a reasonable interpretation of the facts might lead to a different conclusion. Nothing in the surrounding circumstances can be believed to have amounted to duress. No contention is made that Bram thought himself bound under penalty to speak; his position was such that he would naturally choose to speak in answer to the questions. He did so choose; but he was entirely at liberty to say nothing. The fact that he was being searched is immaterial; for the search was not used as a means for extorting a confession. It made no difference that he thought that his statement might tell for or against him; for even an express declaration by the detective that his words would be used against him would not have vitiated the confession. *Regina v. Baldry*, 2 Den. C. C. 430. Neither was there anything in the circumstances to make Bram misinterpret the detective's words and see in them a suggestion of favor. The circumstances, on the contrary, would rather have tended to put him on his guard, and to disincline him to imagine a promise of favor when none was expressed. The position taken by the court, must, therefore, be regretted; for by an extreme decision the verdict of a jury after a protracted trial is set at naught because of the admission of evidency which can have had but little weight.

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THE PRESENCE OF AN ACCUSED PERSON AT HIS TRIAL. — In a recent trial for burglary in one of the English Assize courts the prisoner gave an unexpected turn to affairs by suddenly leaping out of his place and endeavoring to make an assault upon the judge conducting the trial. He was seized and returned to his position, and on the following day was brought into court in fetters. He persisted, however, in conduct so vociferous and offensive that the judge finally ordered that he should be removed from the court-room and that the trial should proceed without him.

The disposition of the common law to give to those accused of crime every reasonable advantage has often been commented upon. One of the most ancient examples of this is the right of a prisoner to be present at his trial if accused of anything more than a misdemeanor. So stringent has the law been in this particular that if at any time during the trial the prisoner was absent, the trial was either absolutely dropped or at least adjourned until his return. (Foster C. L. 76; 1 Ld. Raymond, 267.) The reason that originally underlay this requirement, in the days when every felony was punishable by death, was twofold. That it was a real, tangible advantage to the prisoner to be present and see that every possible effort was made in his behalf is manifest. It was no less an advantage to the State that he should do so. While it is for its interest that crime should be punished, it is equally for its interest not to lose its citizens if good reasons could be adduced for preserving them. Under these circumstances it naturally followed that the prisoner could not, even if he chose, permit his trial to go on in his absence. The State, as an interested party, had the right to compel him to be present and do all in his power to defend himself. At the present time much of the force of these reasons has disappeared. The usual punishment for felony is no longer death, but

imprisonment. Hence, no matter how negligent the prisoner may be in his own defence, the State will not suffer the loss of one of its citizens. More than this; his defence to-day is conducted wholly by his counsel, and the influence of his presence as a factor in determining the decision of the case is insignificant. For these reasons it may be said that the absence of the prisoner must be a matter of indifference, since neither party can be prejudiced thereby. While, however, all this may be admitted as true, yet there can be little question that, as a rule of criminal procedure, the presence of the accused at his trial is, in all cases save misdemeanors, indispensable. Such being the case, it would seem that while no practical injustice would be done by the removal of a disorderly prisoner from the court-room, as a question of procedure it would be better to keep him present, putting him under whatever restraint may be necessary in order to allow the trial to continue.

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A UNITED STATES BANKRUPTCY LAW.—The establishment of a federal bankruptcy law was proposed by twelve different bills introduced in the first session of the Fifty-fourth Congress. Aside from a consideration of the relative merits of these bills, the need of a uniform law of bankruptcy is apparent. It is necessary for the assistance of debtors, the protection of creditors, and the furtherance of national commercial interests. Few, indeed, deny the necessity; State bankruptcy statutes are inadequate, because they cannot under the federal Constitution deal with debts existing outside the limits of their respective States. Honest debtors, therefore, who wish to pay their creditors fairly and then to start fresh, are prevented perhaps by one obdurate creditor in another State who will not agree to the composition offered. Creditors, on the other hand, have no protection against fraudulent preferences on the part of debtors living in other States; so that from both points of view the commercial equilibrium of the nation is disturbed.

The Constitution of the United States gave Congress power to pass a national bankruptcy law; and the exercise of this power was thought as much a matter of course as the exercise of the power to establish a judicial system. The event has not equalled the expectation; and although several laws have from time to time been passed, the nation has during the greater part of its existence been without a federal law of bankruptcy. The first law was passed in 1800, only to be repealed three years later. The second act, in 1841, followed the panic of 1837-38, and was repealed thirteen months after becoming a law. The third act had a longer life; it was passed in 1867, and remained in force eleven years. In June, 1878, it was repealed; and no law has since then been enacted. These bankruptcy acts, it is to be noted, in every case came into existence in times of great financial depression. The present time also is one of depression; in fact, the depression has been the greatest that the country has known since 1874; and the immediate need of a bankruptcy law is pressing. It must not be supposed, however, that the need is temporary; hard times do not create the necessity, they merely accentuate it. The former acts were repealed because of defects in their machinery, not because when business revived they were no longer needed. The need still remains for an equitable law, perfect in its details, which may become a permanence.



**STENOGRAPHER IN GRAND JURY ROOM.**—In a late Maine case, *State v. Bowman*, 38 Atl. Rep. 331, it appeared that an official court stenographer was present, at the request of the county attorney and by express order of the court, at a meeting of the grand jury, and assisted the county attorney by taking stenographic notes of the testimony, retiring, however, before the jury began to deliberate. It was held that the presence of the stenographer invalidated the indictment found under those circumstances. The Supreme Court of Indiana, on the other hand, in a still more recent decision, *State v. Bates*, 48 N. E. Rep. 2, held that the presence of a stenographer employed by the prosecuting attorney was not, in the absence of proof that the accused was prejudiced thereby, sufficient ground for quashing an indictment. The court, in the latter case, considered that the attendance of a stenographer at a meeting of the grand jury was not inconsistent with the due administration of justice in criminal cases, since he was, in effect, an assistant of the prosecuting attorney.

The position taken by the Indiana court seems to be clearly in accordance with the weight of authority and with enlightened methods of procedure. While it is almost universally the law that only members of the grand jury shall be present at its deliberations, it is generally held perfectly proper for the prosecuting attorney or his assistants to be present at the hearing of evidence. The view of the court in *State v. Bates*, that a stenographer comes within the description of an assistant to the prosecuting attorney, seems clearly right on principle, and is supported by federal decisions. It is conceived, furthermore, that on this point no valid distinction can be drawn between the two cases under consideration. While the stenographer, in *State v. Bowman*, was a court official, and was present in the grand jury room by the express order of the judge, he was there, nevertheless, as the assistant of the county attorney.

The grand jury usually selects one of its own number as clerk; yet few jurymen are competent to take notes in longhand rapidly and accurately, and fewer still have any knowledge whatever of stenography. As a practical matter, therefore, it would seem to be not only proper, but necessary, especially in cases where the evidence is technical or involved, to call in the services of an expert stenographer. Moreover, were care exercised in the selection of stenographers, it is believed that the chances of maintaining secrecy in regard to the transactions of the grand jury would not be materially lessened. It is difficult to see, also, why the presence of a stenographer at the taking of evidence should interfere with the free exchange of views among the jurymen, when discussion by the jury is reserved until after the stenographer, attorney, and witnesses have all retired. Furthermore, if the accused could show that he had been injured by the presence of the stenographer, he would be entitled, under the Indiana rule, to ask for the quashing of the indictment.

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**LABEL OF VESSEL FOR SEAMAN'S WAGES.**—The peculiar conditions in which the master of a vessel and his sailors are placed during a voyage, the necessity for unrestrained authority on the one hand and implicit obedience on the other, as requisite to the general safety of all, have probably contributed much to the differences, as to the rights of the parties to contracts, between those made under maritime law and those made under common law. Thus, until a change was made by statute, the wages



of the sailor were dependent upon the completion of the voyage. The summary process by which a deserter may be seized and forced to complete the voyage for which he has shipped, is another illustration of the anomalous character of rights arising from this peculiar relation. (Desty, Commerce and Navigation, 187.)

Desertion, from the nature of the offence, has always been punished by heavy penalties, the forfeiture of wages on the part of the offender being among the lightest. In accordance with this view, a recent decision in the United States District Court for Eastern New York holds that compelling a fireman to work overtime, to the extent of fourteen hours in one year, is not sufficient ground for desertion; and that consequently a libel against the vessel for the balance of wages claimed as accrued since the desertion must be dismissed. (See New York Law Journal, Dec. 6, 1897.) The case seems clearly right; abuse, deviation from the voyage, and refusal to supply provisions, have hitherto been recognized as practically the only grounds sufficient to justify a sailor in abandoning his vessel. In other words, these alone have been regarded as breaches that so go to the essence of the contract as to release the other party. If for any of these reasons a mariner abandon his vessel, it is clear that the master could not set up his own wrong to prevent the recovery of all the wages due upon the contract, less what the sailor might have earned in the meanwhile. (*The Castilla*, 1 Hagg. Adm. 59.) But it is only in these cases, where there would be a palpable injustice in compelling the mariner to remain, that he can leave his vessel. The dependence of the captain upon his sailors, the fatal delays that might often ensue were the rule otherwise, show the reasonableness of the law as it stands; and it seems clear that under it the desertion in the present case cannot be justified.

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ASSIGNMENTS IN TRUST FOR CREDITORS. — A recent decision in the District of Columbia Court of Appeals (*Smith v. Herrell*, see 25 Wash. L. Rep. 822) brings up the question of the necessity of assent on the part of creditors to render enforceable an assignment made in trust for them. That case follows the rule, well settled in most of our jurisdictions, that such assent either is not necessary or is presumed. But the law of England and of Massachusetts is otherwise. The English doctrine, founded principally on the well-known cases of *Wallwyn v. Coutts*, 3 Mer. 707, and *Garrard v. Lauderdale*, 3 Simon, 1, treats an assignment without the assent of creditors as void of consideration, and amounting merely to a revocable power to dispose of property given to an agent by the debtor for his own convenience. Yet the intention to create a trust would seem to be shown in nearly all the English cases by the words "in trust," without any reservation of a power to defeat that intention being expressed. This, together with the transmutation of possession, would of course create a perfect trust without any consideration. It further seems difficult to require the assent of creditors in view of the numberless trusts that are created for persons absent or not yet in being.

The Massachusetts decisions, beginning with the early case of *Widgerly v. Haskell*, 5 Mass. 144, have uniformly supported the English rule. The English courts themselves, however, have recently shown a disposition to depart somewhat from their former doctrine. In the case of *New Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, it was decided that an assignment in trust for particular persons is irrevocable, while one for

creditors in general is revocable. The distinction taken is that in the former case the intention of the assignor could only be to benefit the persons named, while in the latter his object might be either to benefit the creditors or to further his own convenience. But here again it may be observed that the circumstances of a case must indeed be strong to show in the face of the words "in trust for creditors" that the debtor made the assignment for his own convenience, and not for the benefit of his creditors. Furthermore, all the reasons of policy would seem to lead rather to the American doctrine. Assignments in trust for creditors should be supported whenever possible; and to dispense with the delay caused in obtaining the creditors' assent is obviously of benefit in transactions where prompt action and despatch are especially desirable.

## RECENT CASES.

**AGENCY — APPLIANCES — ASSUMPTION OF RISK.** — A master promised a servant to remove a defect in certain machinery. *Held*, that the servant may rely on the promise and continue in the service without assuming the risk, only for such time as is reasonably sufficient to enable the master to remedy the defect. Three judges dissenting. *Illinois Steel Co. v. Mann*, 48 N. E. Rep. 417 (Ill.).

The dissenting judges proceed on the ground that the test is whether such a time has elapsed that it would be unreasonable for the servant to rely longer on the master's promise, and not whether the master has had a reasonably sufficient time in which to make the repairs. This precise point has seldom been discussed. The question is one of intention, for whenever the servant must be taken to have assumed the risk, the liability of the master ceases. *Mechem, Agency*, §§ 660, 661. In applying the rule of the principal case, it might happen that the master's liability would terminate while the repairs were in course of completion, but this result would be very unreasonable. There is some loose language in the books supporting the decision, but the dissenting opinion is preferable, as it is unjust to hold that the servant intends to assume the risk so long as he may reasonably expect the master's promise to be performed. *Shearm. & Red., Neg.* § 96; *Eureka Co. v. Bass*, 81 Ala. 200.

**AGENCY — BANKS — DRAFT FOR COLLECTION.** — The plaintiff placed a draft for collection with a bank. The bank exercised reasonable care in the selection of sub-agents necessarily employed to do the work, and seasonably transmitted the draft through such sub-agents to the place of payment. *Held*, that on default of one of these sub-agents the bank was not liable to the plaintiff for the amount of the draft. *Irwin v. Reeves Pulley Co.*, 43 N. E. Rep. 601 (Ind.); *State National Bank v. Thomas Mfg. Co.*, 42 S. W. Rep. 1016 (Tex.).

There is much conflict of authority as to the liability of a bank to one who deposits with it a draft for collection in a distant place. In the federal courts, in New York, and in some other States, the bank is held to be an independent contractor, and so liable to the depositor for any default of its correspondents. *Exchange National Bank v. Third National Bank*, 112 U. S. 276; *Allen v. Merchants' Bank*, 22 Wend. 215. In other States the doctrine of the principal case prevails. *Dorchester Bank v. New England Bank*, 1 Cush. 177. The question is really one of fact. It would seem that from the nature of the case there is an implied authority for the appointment of sub-agents by the collecting bank. The latter is not expected to collect personally, and the better view seems to be that it ought not to be held to anything more than reasonable skill and ordinary diligence in the selection of its correspondents. *Mechem on Agency*, § 514.

**BILLS AND NOTES — PURCHASER FOR VALUE — COLLATERAL SECURITY.** — *Held*, that the holder of a note on collateral security for an antecedent indebtedness is not a purchaser for value. *Noteboom v. Watkins*, 72 N. W. Rep. 766 (Iowa).

The doctrine of the principal case has been strongly supported, notably in New York. *Stalker v. M'Donald*, 6 Hill, 93. The better view is against it. *Bigelow on Bills and Notes*, 216; 1 *Daniel, Negotiable Instruments*, § 826. It is generally said that the consideration is the obligation imposed on the creditor by becoming the holder of



the note. This seems unsatisfactory, for the holder of the note is given a claim on persons on whom before he had no hold. This is rather a benefit conferred on him than a detriment suffered by him. It has been suggested that a more satisfactory way of reaching the same result is to abandon the search for a common-law consideration, and consider the position of the holder of the collateral. He has the title, and the question is one of conflicting equities. As between two persons having equal equities, the legal title should prevail. *Price v. Neal*, 3 Burr. 1354. In the great majority of cases the position of the holder of the collateral security has been changed, and the court will not examine to see if there has actually been a change in the particular case. These considerations, taken in connection with the desire of the merchants for a settled rule, would justify a decision opposite to that in the principal case. Such is universally the rule on the Continent, and a similar result has now been reached in New York by statute.

**CARRIERS — CONTRIBUTORY NEGLIGENCE OF PASSENGER.** — Where one who has procured a ticket has to cross a track to reach his train, *held*, that the rule as to looking, applicable to strangers or employees, does not apply, and the question of contributory negligence of the passenger should have been submitted to the jury. *Wurner v. B. & O. R. R. Co.*, 18 Sup. Ct. Rep. 68.

This question does not seem to have arisen in the United States Supreme Court before. The decision is in accord with authority. Fetter on Carriers of Passengers, § 136, and cases cited. Because of the carrier's duty to passengers to use the highest degree of care, and of the right of the passenger to assume that in such a case as the principal one the passage is safe, courts have not been inclined to adopt a rule which keeps the question of contributory negligence from the jury. In case of a passenger, looking does not seem to be required even in States where a stranger is governed by the "stop, look, and listen" rule. *Pa. R. R. Co. v. White*, 88 Pa. St. 327. The Supreme Court of the United States has apparently been averse to adopting the "stop, look, and listen" rule to its full extent. *Delaware R. R. Co. v. Converse*, 139 U. S. 469. It would therefore be more ready to adopt any distinction made in case of passengers.

**CONSTITUTIONAL LAW — CLASS LEGISLATION — INDIANS.** — *Held*, that a State law forbidding the sale of liquor to any Indian, applies to an Indian who is a citizen of another State and of the United States, and is a valid exercise of the police power and not in violation of the Fourteenth Amendment. *State v. Wise*, 72 N. W. Rep. 843 (Minn.).

The court says it is well known that, in spite of individual exceptions, the Indians as a race are less civilized than the whites, less subject to moral restraint, more liable to acquire the liquor habit, and more dangerous when intoxicated, and the legislature might therefore reasonably pass the law in question for the mutual protection of the Indians and the community. In view of the present unfortunate situation of the Indian race, this reasoning seems justifiable, especially in regions where the Indians continue to live together in bodies in a low state of civilization, although by a hasty administration of the Severalty Act of 1887 they may have become citizens. The statute, in this view, does not make an arbitrary race discrimination, but rests on the mental and physical peculiarities of the Indians; and its harsh operation on certain members of the race affords no argument against it. Whether similar legislation would be sustained with regard to members of other races admittedly inferior as a whole to our own in point of civilization, it is impossible to say, although the same reasoning would seem to apply. The question would probably be greatly affected by public sentiment.

**CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — CHANGE OF REMEDY.** — A gave a judgment note when, according to the law in force, it was possible for the payee to confess judgment at any time before an assignment for the benefit of creditors, and thereby obtain a preference. Four days before confession of judgment in accordance with the warrant of attorney in the note, a statute went into effect, providing that within ten days after any such judgment the debtor might defeat the levy by a voluntary assignment. *Held*, that as to existing contracts the statute is unconstitutional as impairing the obligation of contracts. Cassoday, C. J., dissenting. *Second, etc. Bank v. Schrank*, 73 N. W. Rep. 31 (Wis.).

There is doubtless a distinction between the rights under a contract and the remedy upon it. The latter may be changed if what is substituted is adequate to enforce the rights of the parties. The Statute of Limitations may be shortened as to existing contracts if reasonable notice be given. *Terry v. Anderson*, 95 U. S. 628. But the remedy may be so altered as substantially to impair some right growing out of the contract. When this is the result the law is void. *Brine v. Ins. Co.*, 96 U. S. 627. So in the principal case the legislature has in reality provided a method whereby the



debtor can destroy a preference legally gained by the creditor. The dissenting judge takes the ground that the law is good because it is simply a new provision of the insolvency law to secure a more equitable distribution of the debtor's property. But insolvency acts, like other laws, are good only so far as they do not impair the obligation of contracts. See *Ogden v. Saunders*, 12 Wheat. 213.

**CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — LOTTERY FRANCHISES.** — *Held*, that a lottery franchise granted by a State is not a contract within the meaning of the constitutional provision forbidding the States to pass laws impairing the obligation of contracts, but is simply a license which the State, under its police powers, may revoke at any time. *Douglas v. Commonwealth of Kentucky*, 18 Sup. Ct. Rep. 199. See NOTES.

**CONTRACTS — IMPLIED PROMISE TO PAY FOR SERVICES.** — The plaintiff performed work for the defendant, at the latter's request. At the time, the plaintiff intended to make no charge, as he expected to receive employment from the defendant. The defendant did not know of the plaintiff's intention, but had made no agreement to pay. *Held*, the plaintiff could recover the value of his services. *Thomas v. Thomasville Shooting Club*, 28 S. E. Rep. 293 (N. C.).

If both parties understood that the services were to be gratuitous, of course the plaintiff could not recover. No legal obligation would be created by the performance of work which was intended and received as a gift. *Osborn v. Guy's Hospital*, 2 Str. 728; *Collyer v. Collyer*, 113 N. Y. 442. But in the absence of agreement or special relations between the parties, when one person does work for another, at the latter's request, there is an implied promise to pay for it. A secret intention to make no charge does not make a gratuity of that which would otherwise create a legal obligation. At most, such intention only shows that, under certain circumstances, the one who did the work was willing to waive a legal right which he might enforce if he desired. *Baxter v. Gray*, 4 Scott N. R. 374; Keener, *Quasi-Contracts*, 315 *et seq.*

**CONTRACTS — SALES — SEVERABLE CONTRACTS.** — Defendant, a butcher, contracted to sell to plaintiff all the hides, calfskins, pelts, and tallow of animals to be slaughtered by him during a certain period, the rate of compensation for each article being fixed. Plaintiff deposited \$200 to bind the bargain. He afterwards refused to take the hides, whereupon defendant declined to deliver the other articles. *Held*, that the contract is severable, and plaintiff may recover damages for the non-delivery of those articles. *Herzog v. Purdy*, 51 Pac. Rep. 27 (Cal.).

The court lays down the broad rule that a contract for the sale of different articles, affixing a price for each, is presumably severable. This is supported by the weight of authority. 2 Pars. Cont., 8th ed., 633, 637. Where the transactions are really separate the result is just, but it would seem that each case should be judged according to its circumstances. In the principal case the facts would justify the conclusion that the defendant wished to dispose of all the articles he could not use in his business by one entire contract, and then the question should be whether the plaintiff's refusal to take the hides was a breach going to the essence of the contract. This is the test applied in contracts where all the articles are of the same kind, and also in instalment contracts, and it is difficult to distinguish the principal case from these. *Norrington v. Wright*, 115 U. S. 118; *Baker v. Higgins*, 21 N. Y. 397.

**CONTRACTS — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS.** — A and B entered into an oral contract as to certain land. B alone signed a memorandum sufficient to satisfy the Statute of Frauds. *Held*, that A was entitled to specific performance, for by bringing the suit, plaintiff, in writing, consents to the contract and makes the remedy as well as the obligation mutual. *Central Land Co. v. Johnston*, 28 S. E. Rep. 175 (Va.).

The case is interesting as overruling *Wood v. Dickey*, 90 Va. 160, which seems to be the only decision *contra* in any court, although some of the earlier cases contain *dicta* to the same effect. The decisions are usually put on the ground that plaintiff, by bringing the action, makes the remedy mutual. A better reason would appear to be that the memorandum on plaintiff's part can be made at any time, and the bill itself may be regarded as one. This is suggested in Story, Eq. Jur. § 755, and adopted as the proper ground in Browne, St. Frauds, § 366, where the authorities are collected.

**CONTRACTS — STRANGER TO THE CONSIDERATION — SOLE BENEFICIARY.** — The declaration alleged that defendant offered the services of his stud-horse for a certain sum, and further agreed to pay \$750 to the owner of the first of the foals of said stallion that should trot a mile in two minutes and thirty seconds. One P bred his mare to this stallion, and sold the foal to plaintiff, to whom, on performance of the con-

dition, defendant refused to pay the \$750. On demurrer, it was *held* that the declaration stated a cause of action. *Whitehead v. Burgess*, 38 Atl. Rep. 802 (N. J.).

The court construed the contract to mean that the money was to be paid to the person who should own the colt at the time it should trot the mile. Perhaps a more natural construction would be that the money was to be paid to the owner of the dam, in which case the contingent right of action would be impliedly assigned by the sale of the colt. On the construction adopted by the court, the plaintiff was clearly a sole beneficiary though a stranger to the consideration. Earlier cases in New Jersey establish the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, that a third party may sue at law on a contract made for his benefit, provided the promise looks to the satisfaction of a valuable claim of the third person against the promisee. *Laing v. Lee*, 20 N. J. Law, 337; *Joslin v. New Jersey Car Spring Co.*, 36 N. J. Law, 141. The New York courts, resting the doctrine on the principle of subrogation, refuse to extend it to actions brought by a sole beneficiary. *Buchanan v. Tilden*, 39 N. Y. Supp. 228. In the present case this distinction was not taken, the court treating *Joslin v. New Jersey Car Spring Co.*, *supra*, as necessarily controlling the question to be decided. There appears to be no other case in New Jersey according a right of action to a sole beneficiary.

CRIMINAL LAW — INDICTMENT — STENOGRAPHER IN GRAND-JURY ROOM. — A stenographer employed by the prosecuting attorney was present in the grand-jury room and took down in shorthand the evidence on which the indictment was based, for the use of the prosecution. *Held*, that the presence of the stenographer was not ground for quashing the indictment in the absence of proof that the accused was prejudiced thereby. *State v. Bates*, 48 N. E. Rep. 2 (Ind.). See NOTES.

EVIDENCE — CONFESSIONS. — When a statement of one accused of murder is induced by words on the part of a police officer which, under all the circumstances of the case, must give rise to some fear or hope of favor in the mind of the accused, and the statement so made is subsequently admitted in evidence against the accused, the admission of this evidence is *held* error for which a new trial must be granted. *Bram v. United States*, 18 Sup. Ct. Rep. 183. See NOTES.

EVIDENCE — SEDUCTION — REPUTATION OF PROSECUTRIX. — *Held*, that on the issue of the previous chaste character of the prosecutrix in a seduction case, the head of a family of which the prosecutrix was a member for three months may express an opinion based on his acquaintance and an observation of prosecutrix's general conduct. *People v. Wade*, 50 Pac. Rep. 841 (Cal.).

Evidence of general reputation is admissible for the accused in criminal cases, *Reg. v. Rowton*, L. & C. 520; and where the character of the complainant is a part of the issue, as in a proceeding for slander, or seduction, evidence of general reputation is admissible even in civil cases. *Scott v. Sampson*, 8 Q. B. D. 491. The difficulty with the evidence received in the principal case is, that it is not evidence of the general reputation of the prosecutrix for chastity, but the personal opinion of a single witness. Such evidence cannot properly be admitted. *Conkey v. People*, 1 Abb. Ct. of App. Dec. 418.

JURISDICTION — SUIT TO VACATE JUDGMENT — NON-RESIDENT. — Defendant, a non-resident, had obtained a divorce by fraud, which the plaintiff sued to have vacated. The defendant had left the State, and notice was served on him by publication. *Held*, the court had jurisdiction. *Everett v. Everett*, 47 N. Y. Supp. 994.

The defendant, having once put himself within the jurisdiction of the court by bringing suit, is within its control as long as the suit continues. *Elsasser v. Haines*, 52 N. J. L. 10. A petition to set aside a judgment is a part of the same suit, for it need not be begun by original writ. *Edson v. Edson*, 108 Mass. 590. The court therefore has jurisdiction over the parties, although the petition may, because of the practice of the State, take a form apparently distinct from that of the original proceedings. *Fitzsimmons v. Johnson*, 90 Tenn. 416, 436.

PROPERTY — ADEMPMENT OF PORTIONS — PERSON IN LOCO PARENTIS. — *Held*, that a father is the only person who is *prima facie in loco parentis* as regards the equitable rule, known as the rule against double portions, viz. that an advancement by a testator during his life to one toward whom he is *in loco parentis* is presumed to be in satisfaction of a provision in a previously executed will in favor of the same person. The rule, therefore, does not apply to provisions made for a child by the mother, without positive proof that she assumed the position of a father with its attendant moral duties. *In re Ashton*, [1897] 2 Ch. 574.

The term *in loco parentis* is ambiguous, and seems to have different meanings in different connections. See *Sayre v. Hughes*, 5 Eq. 376, 380. The principal case



however, seems to be in accordance with the general understanding as expressed in numerous *dicta*. The case seems right also in that it restricts the application of the rule against double portions, which, though well established, has been severely and justly criticised. 2 Story, Eq. Jur., 13th ed., §§ 1109-1118.

PROPERTY — ADVERSE POSSESSION — MINING LANDS. — The defendant occupied adversely for the statutory period six acres of a large tract of land owned and worked by a mining company. The land directly underneath the six acres had not been worked by the company. *Held*, the defendant acquired title only to the surface of the land occupied and not to the mineral estate beneath. *D. & H. Canal Co. v. Hughes*, 38 Atl. Rep. 568 (Pa.).

The case presents an important question for mine owners, and one of such novelty that the court was unable to find any authorities, either cases or text-books. The extent of the defendant's occupation must determine the amount of property to which he acquired title, and this must be considered with reference to the circumstances. The occupant of the surface of ordinary land acquires title to the soil below. This title must rest on the presumption that occupation of the surface is possession to the centre of the earth; it cannot rest on actual possession, for there has been none. But it would be absurd to require the occupant to take possession by digging. To rebut the presumption in the case at bar there were several facts: the defendant had never claimed anything but the surface; he had never mined, although he knew of the mineral estate; the plaintiff company was mining near at hand and had easy access to the property without disturbing the defendant's occupation of the surface; the surface was of trifling value compared with the mineral estate. The conclusion, therefore, that the defendant, in order to have acquired title to the mineral estate, should have taken actual possession by mining, seems to be justified.

PROPERTY — FRAUDULENT CONVEYANCES — STATUTE OF FRAUDS. — Defendant entered into an oral contract with A in consideration of marriage, that he would convey to her a home in her own right. After marriage he conveyed to her a house and land in performance of the contract. Plaintiff was a creditor under a judgment rendered after the conveyance. *Held*, that the original contract was void by the Statute of Frauds and would not support the conveyance, which was therefore voluntary and fraudulent. *Keady v. White*, 48 N. E. Rep. 314 (Ill.).

Apparently in Illinois, a contract in consideration of marriage is void unless the memorandum be contemporaneous. *McAnnulty v. McAnnulty*, 120 Ill. 26. The general rule, however, is that the memorandum may be made at any time before action brought, even after marriage. *Barkworth v. Young*, 4 Drew. 1. On the latter view the transaction in the principal case should be upheld. In the analogous case of an oral trust, the trustee may convey to his *cestui* even after bankruptcy. *Gardner v. Rowe*, 2 Sim. & St. 346. A written ante-nuptial agreement as to specific property may be carried out, and this should be allowed even where the agreement is oral, as in the case of the trust. This view is supported by a few cases, e. g., *Hussey v. Castle*, 41 Cal. 239. In the principal case there is no agreement as to specific property, but the wife is at least a creditor, and a conveyance to her, therefore, would not be within the statutes against fraudulent conveyances, whatever might be the effect of the statutes against preferring creditors. But the authorities generally hold that carrying out an oral ante-nuptial agreement, even as to specific property, is a fraudulent conveyance. *Warden v. Jones*, 2 De G. & J. 76.

PROPERTY — REGISTRY OF DEEDS — NOTICE. — A sold land to B, and later to C, who recorded his deed first. After B's deed was on record, C mortgaged the land for value to D, who was ignorant of B's claim. D then recorded. *Held*, that D's title would prevail over B's, if C bought without notice of the previous deed to B, otherwise not. *Parrish v. Mahany*, 73 N. W. Rep. 97 (S. D.).

The South Dakota statute makes every deed of land void against a later *bona fide* purchaser for value whose deed is first recorded. Taking this literally, C would be protected and could pass good title, if he bought in good faith; but if not, he would not be protected, nor would D, since the latter's deed was not first recorded. The decision might have been put on this narrow, perhaps too narrow, construction of the statute. The court, however, goes on the ground that D, having constructive notice of the earlier deed to B, must at his peril ascertain if C bought *bona fide*. This is begging the question, as it is much disputed whether a grantee has notice of any deeds by a grantor under whom he claims, if recorded after the deed by that grantor which is in the grantee's chain of title. *Conn v. Bradish*, 14 Mass. 296; *Morse v. Curtis*, 140 Mass. 112; *Fallass v. Pierce*, 30 Wis. 443; *Woods v. Garnett*, 72 Miss. 78. Another branch of the same general question was touched on in the discussion of *Bennett v. Davis*, 38 Atl. Rep. 372, in 11 HARVARD LAW REVIEW, 344.



PROPERTY — RULE IN *SHELLEY'S CASE*. — *Held*, that the rule in *Shelley's Case* is a positive rule of law and not a rule of construction. *Van Grutten v. Foxwell*, [1897] A. C. 658.

This decision of the House of Lords, and especially the clear and careful opinion of Lord Macnaghten, should do away with all the misunderstanding which has so long enveloped the rule in *Shelley's Case*. Lord Macnaghten gives a detailed history of the rule and of the controversies to which it gave rise. He effectually disposes of the idea that the rule is one of construction to give effect to the "general intent" over the "particular intent," an idea which prevailed in the mind of at least one great lawyer as late as 1884; see opinion of Earl Cairns in *Bowen v. Lewis*, 9 App. Cas. 890, 907.

PROPERTY — TENANT AT WILL — NOTICE TO QUIT. — The plaintiff was A's tenant at will. A conveyed the premises to B, and B received rent from the plaintiff. B afterward leased part of the premises to C, and the plaintiff was forcibly ejected by the defendant, C's servant, without notice to quit. *Held*, the plaintiff's tenancy was terminated by the lease, and he could not maintain trespass *quare clausum*. *Seavey v. Cloudman*, 38 Atl. Rep. 540 (Me.).

Upon payment of rent to B, the plaintiff became B's tenant at will. *Anderson v. Prindle*, 23 Wend. 616. So the question for the court was whether a landlord could terminate a tenancy at will by a lease of part of the premises, without giving the statutory notice to quit. The result reached, that the statute did not apply to the present case, and that the tenancy was terminated by the lease without notice, seems to be in harmony with previous decisions in Maine and Massachusetts. It has been held that a tenancy at will is terminated without notice to quit when the landlord conveys the premises: *McFarland v. Chase*, 7 Gray, 462; *Robinson v. Deering*, 56 Me. 357; even if the conveyance is merely colorable: *Curtis v. Galvin*, 1 Allen, 215; so, too, when the landlord leases the whole premises: *Pratt v. Farrar*, 10 Allen, 519. The principal case provides one more way of escaping the requirements of the statute. As a result, there seems to be but little vitality left in the statute, and the estate of a tenant at will is as precarious as it was at common law.

PROPERTY — VENDOR'S LIEN. — *Held*, that where land is conveyed by absolute deed, no vendor's lien exists for unpaid purchase-money, in the absence of express agreement by the parties. *Smith v. Allen*, 50 Pac. Rep. 783 (Wash.).

The law is settled the other way in England, *Mackreth v. Symmons*, 15 Ves. 329, and in fully half of our States, including New York, New Jersey, Ohio, Illinois, and Michigan. The English doctrine has been severely condemned in Massachusetts, *Ahrend v. Odiorne*, 118 Mass. 261, and in many other States. In still others it has been abolished by statute. The doctrine apparently developed in England after the settlement of this country, and there is now a strong tendency here to break away from it. The English cases go on the ground that it is unjust to allow a vendee to keep land for which he has not paid. When the vendor can without difficulty secure himself by taking a mortgage, this argument seems of little weight, especially in this country, where land is easily levied on to enforce judgments, and where public policy is strong against secret liens. The English view gives an unpaid vendor an unfair advantage over other creditors of the vendee. Jones on Liens, 2d ed., ch. 1.

SALES — DELIVERY — SECOND VENDEE. — Apples were sold to the plaintiff but left in the possession of the vendor, who afterwards sold and delivered them to the defendant, an innocent purchaser. *Held*, the defendant was not guilty of conversion. *Cummings v. Gilman*, 38 Atl. Rep. 538 (Me.).

After the first sale the vendor is bailee and the vendee bailor of the chattel. Whatever may be the right of the bailor's assignee (10 HARVARD LAW REVIEW, 57), it is well settled that the bailor may maintain trover against the purchaser from the bailee. 2 Notes to Saunders, 91, note h. The defence to such an action must rest on the ground that the vendee has been guilty of fraud in allowing the chattel to remain in the hands of the vendor, and is therefore estopped from denying that the latter is his agent for sale. *Jewett v. Lincoln*, 14 Me. 116. The vendee should have a reasonable time to take possession. *Ingraham v. Wheeler*, 6 Conn. 277, 284; *Kleinschmidt v. McAndrews*, 117 U. S. 282. *Lanfear v. Sumner*, 17 Mass. 110, seems to be the only case where a recovery has been refused unless fraud was shown, but this case has been severely and apparently justly criticised. *Ricker v. Cross*, 5 N. H. 570; *Mcade v. Smith*, 16 Conn. 346, 365; *Taylor v. Boardman*, 25 Vt. 581.

TORTS — INJURY TO EMPLOYEE — DEFECTIVE APPLIANCES. — A railroad track was so laid over a bridge that the ends of bolts in a truss at the side of the bridge were only fifteen inches from a car passing through. Plaintiff, a brakeman in defendants' employ, while descending the ladder in the course of his duties, was struck by the

bolts and badly injured. *Held*, that he could recover. *Bryce v. Chicago, &c. Ry. Co.*, 72 Pac. Rep. 780 (Iowa).

The general rule is applied, that if defendants ought to have foreseen injury to employees from the bolts, they would be liable, unless it was shown that plaintiff entered, or continued in, their employ with notice of the danger, or was guilty of contributory negligence. The decision is interesting as throwing a side light on what are known as low-bridge cases, in which it has been held that railroad companies are not liable for injuries due to low structures over their tracks. It is submitted that these cases are not really in conflict with the principal case, as they may be put on the ground of assumption of a plain risk, or of contributory negligence. The only difference is that there is greater probability of notice to the employee in the case of overhead structures than in the case of those at the side of the track. See *C. & A. R. R. Co. v. Johnson*, 116 Ill. 206; *B. & O. & C. R. R. Co. v. Rowan*, 104 Ind. 88; *Beach*, *Con. Neg.*, 2d ed., § 363.

**TORTS — RAILROADS — LIABILITY FOR FAILURE TO FENCE.** — The defendant company was required by statute to fence its tracks. The railroad passed through A's land, and the defendant allowed him to make an opening in the fence, on condition that he would keep suitable gates at the crossing. A failed to perform the condition, and his default was known to the defendant. The plaintiff's animals trespassed on A's land and strayed thence to the railroad, where they were killed by a passing train. *Held*, the defendant was liable for not maintaining a fence, as required by statute. *Newsom v. Duluth etc. Ry. Co.*, 73 N. W. Rep. 125 (Mich.).

Although the plaintiff's animals were trespassing by going on the track, that did not excuse the defendant for neglect of its statutory duty. *Curry v. Chicago, etc. Ry. Co.*, 43 Wis. 665. In many States, if the animals escape on account of the plaintiff's negligence, the defendant is not liable. *Curry v. Chicago, etc. Ry. Co.*, *supra*. In other jurisdictions the contributory negligence of the plaintiff is no defence. *Flint, etc. Ry. Co. v. Lull*, 28 Mich. 510; *Beach*, *Con. Neg.*, 2d ed., § 230. These fencing statutes are enacted for the purpose of protecting the property of adjoining owners. *Flint, etc. Ry. Co. v. Lull*, *supra*. It would seem, therefore, that the plaintiff should not recover when his animals are not rightfully on the adjoining land. And this is the view taken by some courts. *Manchester, etc. Ry. Co. v. Wallis*, 14 C. B. 213; *Eames v. Salem, etc. Ry. Co.*, 98 Mass. 560. But the doctrine of the principal case prevails in many western States, where the custom of allowing stock to run at large is general. *Beach*, *Con. Neg.*, 2d ed., § 227.

**TORTS — STRUCTURES ON LAND — INDEPENDENT CONTRACTOR.** — The defendant, through its contractor, erected a grand-stand at its race-track. It then leased the structure, and plaintiff, who had paid an admission fee to the lessee, was injured through a defect caused by the negligence of the original contractor. *Held*, that the defendant is liable for the negligence of its contractor. *Fox v. Buffalo Park*, 47 N. Y. Supp. 788.

The case makes the defendant an insurer against his contractor's negligence. It follows *Francis v. Cockrell*, L. R. 5 Q. B. 184; s. c. *ibid.* 501, and is generally law. The latter case was based on the analogy of the liability of common carriers, and the rule in England is limited to structures of a public nature where an admission fee is charged. *Searle v. Laverick*, L. R. 5 Q. B. 122. Some of the States follow the same doctrine, and such is the tendency of the principal case. *Walden v. Finch*, 70 Pa. St. 460. This position is open to criticism, as the law relating to common carriers is rather an anomaly founded on public policy. Other courts base these cases on *Fletcher v. Rylands*, L. R. 1 Ex. 265, and extend the rule to all structures erected on land. *Gorham v. Gross*, 125 Mass. 233. It would seem that this is the true theory, and that the doctrine should stand or fall with the reasoning in *Fletcher v. Rylands*, *supra*. Negligence on the part of the owner or contractor is generally required, however, and the landowner is not made an absolute insurer except in certain dangerous undertakings. *Kendall v. Boston*, 118 Mass. 234.

**TRUSTS — BEQUEST ON A SECRET UNDERSTANDING.** — A testatrix made an absolute bequest of certain property to her executors in case certain charitable trusts, declared in previous sections of the will, should be held invalid. One of the executors drew up the will. *Held*, that his knowledge of the contents of the will implied a secret understanding that he would take the bequest on the trusts declared, and as they were illegal, the next of kin were entitled to his share. *Edson v. Bartow*, 43 N. E. Rep. 541 (N. Y.).

The Court of Appeals hereby affirms the decision of the Supreme Court both in this case and in *Fairchild v. Edson*, 28 N. Y. Supp. 401, in which the charitable trusts were declared void for indefiniteness. Fortunately a statute, N. Y. Laws, 1893, c. 701, passed after the date of this will, has rendered impossible another decision like the latter.



The doctrine of the principal case will therefore never operate again to defeat a testator's wishes in cases of charitable trusts. The decision now upheld is criticised in 10 HARVARD LAW REVIEW, 445.

TRUSTS — LIABILITY OF TRUSTEE — PLEADING. — Where an action was brought against trustees as such for an injury arising from their negligence in caring for the trust premises, *held*, they were not liable as trustees, and an amendment to charge them personally was not permissible, as it would be a new cause of action. *Keating v. Stevenson*, 47 N. Y. Supp. 847.

The decision is correct in holding that at common law the trustees were liable only in their individual capacity as legal owners of property. The common law does not recognize a trustee as trustee. The court dismissed the action on the ground that judgment against defendants as trustees must necessarily be satisfied out of the trust estate and a trustee cannot be allowed to charge the *res* with a personal liability due to his own mismanagement of the trust. But there is no statute in New York making a judgment against a trustee a charge upon the estate, such as has been passed there and in other States in case of executors and administrators. Mass. Pub. Stats. c. 166, § 8; Bliss' N. Y. Code, § 1814. Therefore the judgment at law against the trustees, though named as such, is against them as individuals merely. It is not a charge upon the trust estate, for this the common law does not, unless compelled by statute, recognize. The description as trustees is mere surplusage, an amendment is unnecessary. *Shepard v. Creamer*, 160 Mass. 496; *Odd Fellows Assoc. v. McAllister*, 153 Mass. 296. Under the above-mentioned statutes applying to executors and administrators the words of description would of course not be surplusage. *Yarrington v. Robinson*, 141 Mass. 450.

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## REVIEWS.

BOUVIER'S LAW DICTIONARY. By John Bouvier. New edition, by Francis Rawle. Volume I. Boston: Boston Book Co. pp. xviii, 1125.

Though only the first half of Mr. Rawle's latest revision of Bouvier's Dictionary has been published, the quality of the work can be well judged from what is now at hand. When a work is so well known to the profession, as is this law dictionary in the many editions through which it has passed, it is difficult to say anything new about it, more especially when a former edition has been prepared by the same editor. The latest previous issue of this work, however, came out in 1883, so that evidently the present one ought to be to a very large extent a new book; and so it is, as to a fourth of the whole, while still keeping within the limits of two volumes of a reasonable dictionary size. The additions appear to be largely in the direction of a legal encyclopædia, particularly as to the less technical parts of the law. There is an immense amount of reading in it that will be of interest to the layman as well as the lawyer, such as the articles on Elections, Eminent Domain, and several topics in Constitutional Law. To the lawyer, the completeness of the work as a dictionary, the accuracy of the definitions, and the character of the references, must be the most important points. A hurried examination of this first volume seems to show that it does not in these respects fall below the standard of excellence which might be expected of Mr. Rawle. No work of this sort will ever be perfectly complete. A test of the completeness of a law dictionary, it has been suggested, is whether it explains the nature of a Common *Condidit*. This latest work does not do this; but it is, comparatively speaking, the most comprehensive yet published. It is the product of great industry and wide legal learning; and as such it is likely, owing to the continual demand for works of this character, to receive a very hearty appreciation.

R. G.



ENGINEERING AND ARCHITECTURAL JURISPRUDENCE. By John Cassan Wait. New York: John Wiley & Sons. 1897. pp. lxxx, 905.

This book of Mr. Wait's is a systematic treatise upon a branch of the law which is to-day of great practical importance. After a statement of the general principles of contract, it takes up a construction contract from the time that bids are advertised for until the contract is performed or broken. The rights and liabilities of engineers and architects are then carefully considered. The treatment of agreements for arbitration, arbitration as a condition precedent, and allied topics is very complete. A strong argument, and a sound one, as it would seem, is made for the validity of agreements for arbitration, and their practical utility is clearly shown. The chapter on the employment of engineers and architects as expert witnesses is especially commended to the careful consideration of all those who act in the capacity of experts, or have occasion to employ them. The authorities on the topics treated have evidently been carefully examined, and the principal ones cited, reference being made to standard text-books where others are collected. The plan of the work is excellent, and the statements of the law are in the main accurate. In § 184, however, the decision of *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16, appears to be misconceived. And in § 95 it seems to be laid down that a revocation of a letter of acceptance already mailed will prevent a contract being formed if it reaches the offerer before, or at the same time as, the acceptance. It is doubtful if this represents the law. See Anson on Contracts, 6th ed. 25.

The chief fault—an example of which is to be found in almost every chapter in the book—is the lack of logical arrangement of the matter within the chapters. Sections are placed where they do not belong, and sentences and paragraphs are frequently found in sections with which they have no logical connection. This makes it extremely difficult to follow the reasoning, and get a clear conception of the whole subject. Grammatical and typographical errors, and words improperly used, are numerous. It may even be doubted if the use of the word “jurisprudence” in the title is a correct use of the term. See Holland on Jurisprudence, 8th ed. 4. The word, however, has been thus misapplied so long in various branches of the law that it may be said to have acquired a prescriptive right to be so used.

J. H. F.

TAYLOR'S MEDICAL JURISPRUDENCE. Twelfth American Edition. Edited by Clark Bell, LL.D. New York and Philadelphia: Lea Brothers & Co. 1897. pp. xvi, 832.

This latest edition of a work widely and favorably known to the two professions of law and medicine has brought the subject of medical jurisprudence thoroughly and comprehensively up to date. The book is of more general interest, perhaps, to the physician than the lawyer, yet to the latter, trying a case depending on or involving matters connected with medicine or surgery, it must prove of great service. The entire common ground of the two sciences is apparently covered. The general nature of the book, and its comprehensive treatment of the various ways in which the science of medicine may aid legal investigation, are too well known to require fresh comment. Mr. Clark has continued along the lines adopted in the eleventh American edition, and has increased the practical value of the book to lawyers by citing nearly seven hundred cases and authorities bearing on the subject.

R. L. R.

NOTARY'S AND CONVEYANCER'S MANUEL. By Florian Giauque, of the Cincinnati Bar. Second Revised Edition. Cincinnati: Robert Clarke Co. 1897. pp. viii, 389.

This little volume has been compiled, primarily, as the title would show, for the practical use and convenience of notaries public and general conveyancers. There has been no attempt to criticise or compare the laws of our different States upon the subjects dealt with, but only to state those laws as they exist. A second edition was required because of many recently revised and enacted statutes. The plan of the book is to treat of the various powers of notaries and commissioners, concerning which the statutory provisions of each State are clearly and concisely given, with the required forms of conveyances. With the aid of an ample index and the headings of the sections in bold type, it is an easy matter to find the particular laws of any State desired. In brief, the author seems to have succeeded admirably in fulfilling his purpose of making the book "reliable, practical, and convenient." S. H.

FEDERAL TRUST LEGISLATION. By Carman F. Randolph. Boston: Ginn & Co.: The Athenæum Press. 1898. pp. 43.

The Trans-Missouri freight decision is not allowed to rest. The principle that a combination of railroad companies for determining rates is in restraint of trade within the Trust Act of 1890 is attacked by Mr. Randolph in a clearly stated and well-considered pamphlet, reprinted from the "Political Science Quarterly" for December, 1897. The main point of attack is the conclusion of the court that railroad combinations, although reasonable, may nevertheless be in restraint of trade. The absurdity of this position seems to be exaggerated by the author; for it is quite conceivable that a contract should be of a class so likely to be abused that policy demands a ban upon the whole class. Yet the reader cannot but sympathize with Mr. Randolph's conclusion that combinations of railroad companies are not of a class which must thus be outlawed. The force of this conclusion is strikingly brought out when it is remembered that combinations of corporations engaged in interstate commerce rest upon really the same basis as combinations of laborers so engaged, and that, as Mr. Randolph says, the reasoning which brings all railroad agreements within the Trust Act must cover equally all combinations of workingmen engaged in interstate commerce. This logic seems inevitable; and one cannot help wondering how the Populist members of Congress would answer it.

Accepting, nevertheless, by force of circumstances the construction of the Trust Act which holds that railroad rates must be those fixed by "unchecked competition," the author urges the repeal of the Act on the ground that reasonable restraint of trade is better than the "unrestrained competition of savagery." It is suggested that the argument for free competition would reach the same result. Compulsory competition is not free competition: for free competition, in the broader sense, includes as incidents freedom of contract and freedom of combination. By either path, however, we reach the same conclusion, that the Trust Act as at present construed is opposed to the proper development of the economic state.

Mr. Randolph's pamphlet is to be welcomed as giving to a difficult subject a scholarly treatment which, though not always convincing, is always suggestive. Works of this nature are sorely needed as a check upon ill-considered legislation.

J. G. P.

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## THE CONTINUITY OF THE COMMON LAW.

IN the last chapter of Blackstone's Commentaries, which treats "of the rise, progress, and gradual improvement of the laws of England," we find the opinion that the groundwork of our law — "that admirable system of maxims and unwritten customs, which is now known by the name of the *common law*, as extending its authority universally over all the realm" — "is doubtless of Saxon parentage."<sup>1</sup> Blackstone's reasons for this position may not all be equally acceptable at this day. Some of the institutions in which he finds proofs of Saxon antiquity may be both less ancient and less English than he supposed. Others, though they have no traceable history before we meet them on English ground, may have originally been part of a common stock of Germanic or even Indo-European custom, and may have acquired their peculiar character only during the great work of reconstruction which the genius of Edward I. brought to fulfilment more than two centuries after the Norman Conquest. On the whole, however, Blackstone's *dictum* has been confirmed rather than shaken by the course of modern research. If in some points it is less true to the letter than Blackstone imagined, it is more true to the spirit of our law than he had the means of knowing. Nobody now believes that King Alfred had anything to do with the establishment of trial by jury, but, as we shall presently see, our accustomed form of

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<sup>1</sup> Bl. Com. iv. 412.



trial embodies Germanic principles that are much older. The maxims which Blackstone rated so highly will hardly be considered to form a system by any lawyer of this generation, and it is to be feared that more than one or two of them would turn out, if we traced them back to their earliest ascertainable parentage, to be fragments of Roman learning distorted in various degrees by passing through the hands of canonists. But even the distortion and misunderstanding of our borrowed material bears witness to the independence of our system. Whether we have borrowed that material wisely or not, we have assimilated it and not suffered it to dominate us. In some cases where the borrowing was large, there has been a struggle; but the struggle has always ended in the foreign elements being naturalized.

When we speak of law we mean, for all practical purposes, those rules of conduct which the State deems binding on its citizens, not merely as rational and moral beings but as members of that State, and accordingly thinks fit to enforce by public authority: in other words, the rules which are administered and applied by courts of justice. It is easy for the citizen and the publicist, though impossible for the practising lawyer, to forget that these rules include the forms and methods of doing justice as well as the determination of duties and rights in themselves, and that questions of form often carry with them no small part of the substance, or even the whole. It is still easier to forget that in early stages of society the pressing need is not to define rights, but to know where to have an available remedy which will lead, or may be fairly expected to lead, to some kind of effective judgment. Redress for manifest wrong appears to us a matter of course, and we work out legal problems in full assurance that the solution, when finally arrived at, will be acted upon without difficulty. There were times when the problem was whether and by what means right could be done at all. Our modern maxim "No right without a remedy" assumes the benevolent and irresistible power of the modern law-giver. Under early forms of law "no remedy no right," would be nearer the truth: a man who could not fit his case exactly to an appropriate remedy among a strictly limited number of formulas had practically no right.

The expansion of remedial justice, the perfection of executive method, are no less important in the history of law than the development of positive rules. What is more, the form in which positive rules are declared, the directions in which definition is attempted

or left alone, and the extent to which it is carried in particular branches of the law, depend largely on the procedure by which the rules are to be applied. Thus the existence of the body of rules which we call the law of evidence, and which have no counterpart in any other system, is a direct consequence of the manner in which we regard questions of fact as sharply distinguished from questions of law. That distinction, in turn, is intimately bound up with the history of trial by jury and the transformation of the jurymen from certifiers of facts within their own knowledge to judges of facts who know only what is brought before them, and are bound to take notice only of what is properly alleged and supported by the proper kind of testimony. Those rules of foreign systems which answer most nearly to our rules of evidence are in truth of a different nature. Their purpose is or has been not so much to fix the limits of admissible testimony as to establish a kind of mechanical self-acting scale of value for different kinds of proof and presumption. To trace the consequences of this endeavor would be to enter on the history of inquisitorial procedure, ecclesiastical and secular, on the Continent of Europe. English-speaking students at any rate would probably not find the results of the comparison unfavorable to the common law.<sup>1</sup>

The details of our procedure have undergone many changes.

It is true that the general outlines of a criminal trial might still be recognized by a medieval sergeant at law if he could revisit our assize courts. But our civil procedure has in England been twice reconstructed within living memory, and the learned brother whom we suppose revived to the sight of our modern practice would no doubt begin by thinking that he had everything to learn over again. This would be equally the case, or almost equally, whether he were called up from the generation of Hengham, or of Brian or of Mansfield. And yet, if he allowed himself to suppose that a revolution had taken place in the general model of our judicial business—that the methods of the canon lawyers, for example, had finally prevailed over those of the medieval common law—he would be wrong. The fundamental ideas are still there, and we commonly fail to recognize their importance just because they are so familiar to us.

An Englishman, whether lawyer or layman, is apt to take them

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<sup>1</sup> Cp. A. Lawrence Lowell, "The Judicial Use of Torture," *HARVARD LAW REVIEW*, xi. 220, 290.

for natural and necessary conditions of justice being done at all rather than characteristic features of a natural system. It is certain, however, that they are national, not universal. In fact they are unknown, or have found only very partial acceptance, in the practice of most civilized tribunals outside the English-speaking world.

Stated as briefly as possible, the conditions which we assume as a matter of course rather than explicitly postulate are of this kind.

1. Justice is before all things public. Whatever is not public in judicial proceedings is exceptional, and the exception must rest on some distinct and special ground.

2. Proceedings in all contentious matters are conducted by the parties in their own way, according to the advice of the solicitors and counsel chosen by themselves, or, if they please, in person, and at their own risk as to validity and regularity. Interference by the court, except to pronounce on a dispute whether a pleading or other step is in order, is exceptional and must be in some way specially authorized. As one of our best modern judges has said, "The court is not to dictate to parties how they should frame their case."<sup>1</sup> And this is the ruling principle even in criminal proceedings and other cases where as we say, the Crown is a party. That very phrase bears witness to the power of the idea.

3. The King's judges are the sole authorized interpreters of the law. No other person or body; least of all any executive officer from the King himself downwards, has any such authority. Considered judicial interpretation of the law becomes part of the law itself, and is of equal force with any other part, though liable to be superseded by fresh legislation.

But in other highly civilized countries we find systems where none or hardly any of these features can be traced: "systems which dispense almost entirely with oral evidence," or even oral proceedings of any kind, "and under which the judge intervenes at every stage, and the witnesses, if any, are the witnesses rather of the court than of the parties."<sup>2</sup> Publicity may be found under such systems, but exists only on sufferance, is often absent from the really vital parts of the proceedings, and is easily dispensed with for reasons of State even in matters involving what we call the liberty of the subject. The authority of judicial decisions again,

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<sup>1</sup> Bowen, L. J., in *Knowles v. Roberts* (1838), 38 Ch. D. 263, 270.

<sup>2</sup> J. Macdonell in *Journ. Soc. of Comparative Legislation*, i. 247, 248.



is differently understood not only in some systems, but under all which derive their origin and maxims from the Roman law, except where Anglo-Saxon forensic principles have become dominant through conquest or political assimilation as in several of our colonies and in the one case of Louisiana in the United States. In France and other countries where modern French legislation has been followed this divergent view is expressly laid down. The judge is bound to interpret and apply the law in each case as it occurs, and is positively forbidden to lay down any rule or interpretation as binding. They may be used in the same way that opinions put forward by a private commentator may be used, but not otherwise.<sup>1</sup> Only the formal utterance of the legislature, or of some one authorized for that purpose by the constitution of the State or other express legislation, can have the actual force of law. The width of the difference between the two methods is shown by the fact that English-speaking students almost always have some difficulty, when they first come to hear of the Continental method, in believing that it is really so. Passages can be found in English books of great reputation which more than hint a doubt whether tolerably certain knowledge of the law can be attainable in a jurisdiction where the decisions of the courts are not regularly reported and published.

It is not our business now to discuss the merits of the different systems and principles that prevail in English-speaking countries on the one hand, and in most foreign countries on the other. We are concerned only to call attention to their existence and magnitude. For our present purpose it may be assumed that civilized nations, including ourselves, have by this time shaped their institutions, on the whole, into something which in each case is at least as suitable to their character and habits as anything of a different pattern that the wisdom of strangers could devise for them. But it should be understood, first, that the institutions we think so natural do not always appear natural in other parts of the world and under other frames of society which we have no right to deem less civilized than our own; next, that we have acquired or preserved them, peculiar as they are, not by some spontaneous genius of the Anglo-Saxon race, but through the course of a long and

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<sup>1</sup> For practical purposes the view which a higher court is known to be in the habit of taking has almost the force of law for a judge of first instance, whatever the theory of the law may be: so also the authority of decisions tends to increase wherever they are systematically reported, as in France: but these matters are not now before us.

complex national history; and last, that they must be studied in the light of that history if they are to be rightly understood.

Justice, then, is public; the business of courts is to hear parties and determine between them according to the rules of law, not to conduct an inquiry; that which the court finds as law is and remains the law; such are the principles that have remained characteristic of our judicial proceedings. These, with their developed consequences, are now peculiarly Anglo-Saxon. Once they were common to all the Germanic peoples, the "barbarians" whose customs must have seemed not only crude but insignificant, except for the immediate necessities of practice, to the trained lawyers of medieval Italian schools. Every kind of method has been employed to keep the working powers of our laws and judicature on a level with the needs of society. Acts of royal power, daring fictions, the patient and subtle contrivance of practitioners, legislation on all scales and intricate in all degrees, have had their share. For centuries the rival and essentially different systems of the canon law was administered in the Courts of the Church by judges and advocates whose ambition and energy were not less at any time than those of the common lawyers, and whose technical equipment was more complete. The King's courts themselves, as late as the thirteenth century, were in the hands of clerks in orders, men who were canonists or civilians by breeding. Canonical procedure was the very pattern of the new and powerful instruments of justice which two centuries later were brought into play by the Court of Chancery. Through all this, nevertheless, the old Germanic framework remained unbroken. Overloaded as it was with refinements, eccentricities, and exceptions, the exceptions never became the rule. Many foreign inventions were assimilated, but the native element subdued their spirit to itself. Clerical judges were no less steadfast than lay barons and suitors in their allegiance to the custom of the realm. The jury, which had its beginning as an engine of royal authority to override ancient formalism, became a bulwark of popular rights, and so much did it seem not only English but English born that pious legend ascribed its establishment to Alfred, the first and greatest of English heroes. The Chancellors and their officers triumphed indeed; they pursued forms of wrong which the common law could not pursue, convicted the wrongdoers out of their own mouth, and compelled them to redress and restitution far more thoroughgoing than the process of the common law could ever compass. But in the moment of its triumph the Chancery

had already ceased to be a foreign power. The Chancellor might speak with a Roman accent, but he had to speak with an English tongue. His equity was no longer a method of justice outside the law; it was a new kind of law with different and more searching machinery, but still working on English lines. The element of arbitrary discretion dwindled and the element of rule and precedent waxed. Suitors, or rather their lawyers, had a new game to learn, but they had to watch their play and mark their points as carefully as in the old one.

Persistent attempts again were made in the Tudor and Stuart reigns to set up new courts proceeding by Continental rather than English methods. For some time they seemed likely to succeed, and if the undertaking had been carried on with more discretion the success might well have been permanent. The Star Chamber flourished through several generations, and was a terror to some evil-doers whom the ordinary courts could not effectually reach. But it was also worked in such fashion and to such ends that it became an oppression to honest men, and, having become a symbol of everything most odious in Charles I.'s claims to absolute power, it was involved in the fall of Charles I. and his cause. Under the Restoration, so far from any serious attempts at reaction being made in the department of justice and legislation, half-finished reforms that had been planned under the Commonwealth were quietly carried out. When the Revolution of 1688 finally showed how superficial the political reaction had been, the triumph of English liberties was more than ever felt to be the triumph of English law. Professed zeal for the reform of law, far from being regarded as a sign of liberal opinions, was at that time more likely to bring the reformer into suspicion of a desire to corrupt the common law to tyrannical principles. This kind of suspicion was by no means extinct even in the latter part of the eighteenth century, and it was only in Lord Eldon's time that the union of conservatism in politics and in law was accomplished, while the popular cause became the cause of deliberate and avowed innovation, proceeding by way of appeal not to experience as embodied in the ancient custom of the realm, but to the general welfare as deduced by direct reasoning on principles of utility.

The utilitarian movement of the Reform Bill period and its consequences have tended to obscure for us the importance of another element which has had much to do with the character and stability of English legal institutions. I mean the conception of law as a



body of custom and observance not immutable indeed, but so continuous that legislative acts are only incidents in its life, and its being does not depend on legislation or upon the express will of any defined authority. This conception may be open to dispute, and in fact has been strenuously disputed, on philosophical grounds: as a matter of historical fact, however, it is undoubtedly the conception which prevailed among English lawyers and publicists from the beginning of any systematic treatment of English law till about the middle of the nineteenth century; in other words, for nearly seven hundred years. It derived its strength and significance from the all-important fact that the "custom of the realm" was the custom not of this or that province, or of a subordinate principality, but of the Kingdom. Custom coextensive with the King's regular authority, and certified by the King's own judges, was a different matter from the merely local customs of a town or a privileged jurisdiction. The King of France might well seem to be on a higher level of authority than the Custom of Paris or of Orleans. No such superiority was obvious, or was admitted, in the case of the King of England. Our medieval writers represent him as the patron, protector, and spokesman of the law, not as its master. They will yield the palm of elegant form and scientific method to the written laws of Rome, now the theme of ingenious Italian glossators whose comments are themselves acquiring authority: but they will in the same breath maintain that our unwritten customs, though they may seem but a disorderly crowd, are as truly a body of law as the sentences of the Code and the Digest. One may quote the Roman books for want of any other authority: one may transcribe, as Bracton did, whole pages of a famous glossator; but Englishmen are to be bound by what the King and his counsellors declare, not by the precepts of any Roman book. For the custom of the realm is a living custom, and it grows by the judgments of the King's judges, which, however learned and artificial they may have to be in cases of difficulty, spring from its own soil.

English politics and the development of our constitution have been more influenced than would appear at first sight by the settled habit of regarding the law of the land as essentially founded on custom, and only determined in particulars, and as it were accidentally, by legislation. Down to quite recent times each of the opposing parties, whatever the question at issue might be, was anxious to show, if possible, that it already had the law on its side

rather than to produce legislation in favor of its opinions. This has perhaps not been the least of the forces that have made for the continuity of our institutions; its operation has not been an unmixed good, but few unprejudiced students of our history will doubt that the good has been far greater than the harm. From the merely legal point of view this frame of mind is at least so far commendable that it gives some security against ambitious improvements of the law which are found, on subsequent judicial consideration, to have really added nothing and amended very little.

Within the last two generations, that is to say, since the reforming movement best known to general history in the Parliamentary Reform of 1832, but fruitful in several other directions, there has been a reaction against the traditional view. This is partly because, as Maine pointed out, the functions of express legislation have become far more conspicuous and important. Also the legal habit of mind was not fitted to solve great political problems. The lawyer, so long as he does not transcend the province of his own science, works within a given political system and assumes its stability. He must know the forms and authentic marks of the legislation to which the courts are bound to give effect, but much of the legislation he has to do with is of a minor administrative kind. Rating and sewers are more familiar to the modern practitioner in the Queen's Bench Division than the Bill of Rights; and his ardor as a citizen in advocating legal or other reforms will hardly be enhanced by the reflection forced on him as a lawyer that every piece of reform, so far as it can affect him and his colleagues, will probably mean the learning of new points of practice. The modern theory of Sovereignty, as understood by English writers, which puts the command of the lawgiver in the first place, or even admits no other origin of law, is really not a doctrine of lawyers, but a protest of publicists against the legal tradition. Hobbes in the middle of the seventeenth century, Bentham and his disciples at the close of the eighteenth and the early part of the nineteenth, objected, for very different reasons, to the prevalent constitutional theories of the time. Hobbes sought to attribute absolute power to the King as he was. The successors who developed Hobbes's fundamental positions in detail, adding little to them because Hobbes's dialectical genius had really left little to add,<sup>1</sup> attributed the same power to Parliament as they hoped to make it, with the

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<sup>1</sup> Maine, *Early History of Institutions*, 354.

further hope that a reformed Parliament, conscious of that power, animated by benevolence, and enlightened by modern science, would devote its labors to the promotion of the greatest happiness for the greatest number. They started with this strong point in their favor, that as a matter of fact, our Imperial Parliament answers more nearly to the description of sovereign power according to the school of Hobbes, Bentham, and Austin, than any other legislative assembly in the world. Such were the expectations of the philosophical Radicals in the Reform Bill time: the margin of error and accident between what was expected and what was realized was certainly no greater than is commonly observed in undertakings of that magnitude, and the theory of Sovereignty was perhaps as useful in the day of Bentham and Grote as the theory of the Social Contract had been in the day of Locke. Both were at least inadequate as speculative doctrines, but each of them embodied points of practical wisdom and of relative doctrinal validity which were in need of an intellectual habitation and a name.

For the rest, the uncontrolled legal supremacy of Parliament, long recognized in practice by the courts, appeared to receive a satisfying philosophical confirmation from a theory which, in all probability, had been suggested by that remarkable and almost singular feature of our constitution. We must not forget that the omnipotence of Parliament, as it is often called, was quite as firmly asserted by Blackstone as by his reforming critics.

It would be difficult to say how far the traditional view of law as "custom of the realm" is connected with that specially characteristic rule of English-speaking commonwealths, that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."<sup>1</sup> The proximate reason of this would seem to have been that the King's ordinary judges happily became at an early period of our legal history a compact and powerful body who would brook neither executive encroachments on their jurisdiction nor exemptions of official persons from it. But their work, we may well believe, was made both easier and more effective by the feeling that the law they administered was not local, personal or arbitrary, but universal. We speak of the King's peace, the King's judges and the King's writ, but I do not think Englishmen ever commonly talked of the King's law. No doubt our Kings down to Charles I.

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<sup>1</sup> Dicey, *Law of the Constitution*, 4th ed. p. 183.



claimed an extraordinary jurisdiction to supplement, though not to contradict, the ordinary methods of justice. Out of this power the Court of Chancery grew, and lived: a fact which is not to be forgotten because out of the same power the Court of Star Chamber grew, and perished. It can only be matter of speculation whether, if the Stuarts had been more prudent, further developments of this kind would have taken place, and whether they might have been less or more satisfactory than the various improvements in our judicial system which have been affected by express legislation. As it was, the common law and its methods prevailed. The multifarious forms in which executive regulation and discretion are now exercised in the administration of our affairs of state have to be justified, not by the mere authority of the Crown, but under powers expressly conferred by the enactments of the Crown in Parliament; the interpretation of those powers is in the hands of the judges; and the supremacy of the ordinary law is kept in constant sight and activity by the interested vigilance of those who, with or without success, invoke the assistance of the court either as public authorities, claiming to enforce their rights, or as individuals disputing their alleged liabilities. Legislation has grown upon us, but with it and even because of it the reign of judicial law has grown too.

The truth of this remark, I conceive, must be still more obvious in the United States, where the powers of the Federal Government exist only by virtue of a written constitution, and the powers of State Governments and legislatures are controlled partly by their own constitutions and partly by the Constitution of the United States, while the power of interpreting those fundamental instruments is left, in accordance with our common tradition, to the ordinary courts of justice.

In the ancient courts of the hundred and county, the assembled freemen "made" their judgments, as the form ran. The modern judgments of the common law are made by delegation, the learned persons who render them being appointed in ways which establish a more or less direct connection with the citizens of the commonwealth as a whole. But we make them still.

*Frederick Pollock.*

## LIABILITY OF LANDOWNERS TO CHILDREN ENTERING WITHOUT PERMISSION.<sup>1</sup>

### II.

UPON weighing all the considerations which have been urged up to this point in the discussion, it will probably be admitted by many lawyers that the landowner ought not to be made an insurer of the lives and limbs of childish intruders. But it may be said that such a stringent responsibility is not claimed, and that the better authorities in favor of the child would subject the landowner only to a limited liability, in substance as follows: He is under a duty to take care, not whenever he makes any change whatever in the natural condition of the land, but only when he makes changes which offer special attractions to children and are likely seriously to endanger children yielding to the attractions; and his duty even then is, not an absolute obligation to prevent the possibility of harm to children, but only a duty to take reasonable care under the circumstances to prevent harm.<sup>2</sup>

To this claim of a modified or limited liability there are two answers.

First: The weight of reason inclines to the conclusion that a landowner is under no greater liability (so far as concerns the condition of his premises) to childish intruders "attracted" by his methods of beneficial use, than to adult intruders; *i. e.*, he is under no liability to either class. Upon this view, he is under no duty to have his premises in safe condition for the unpermitted entry of children, nor to take any affirmative measures to keep children out or to protect them after entry. If he is under no

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<sup>1</sup> Continued from page 373.

<sup>2</sup> For a carefully guarded statement of the liability, see the opinion in *Keffe v. Milwaukee & St. P. R. Co.*, 1875, 21 Minn. 207, which the present writer regards as the ablest opinion on the side of the child. The Minnesota court has done its best in subsequent cases to apply and enforce the limitations laid down in the above initial decision. See *Kolsti v. R. R.*, 1884, 32 Minn. 133; *Haesley v. R. R.*, 1891, 46 Minn. 233; *Twist v. Winona, etc. R. Co.*, 1888, 39 Minn. 164; also *Emerson v. Peteler*, 1886, 35 Minn. 481.

Some of the judicial utterances in other jurisdictions have not been so cautiously guarded.

obligation to do any of these things, he is, of course, under no obligation to use any care to do them. It would be a solecism to speak of obligation to use care in the performance of a non-existent duty.

Second: These plausible attempts at limitation, if adopted, would be practically ineffective. Obviously, they would not prevent the landowner from being subjected to the expense and worry of litigation. And, what is still more important, they would not, in the great majority of cases, prevent the landowner from being practically subjected to an absolute liability, substantially equivalent to that of an insurer. The questions of attractiveness and care would generally have to be determined by a jury, and the verdict of that tribunal would seldom be against the child.

The reply of Lord Penzance to an attempt to impose a qualified liability in another branch of the law deserves attention here. An action was brought against a witness who had testified before a military court of inquiry. The plaintiff alleged that the witness knew his testimony to be false and gave it from a malicious motive. The House of Lords held that no action would lie, the statement of the witness being absolutely privileged.<sup>1</sup> Lord Penzance said:<sup>2</sup> "It is said that a statement of fact of a libellous nature which is palpably untrue — known to be untrue by him who made it, and dictated by malice — ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things under which the question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that

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<sup>1</sup> *Dawkins v. Lord Rokeby*, 1875, L. R. 7 H. L. 744.

<sup>2</sup> L. R. 7 H. L. pp. 755, 756.



imputation; or, again, the witness may be cleared by the jury of that imputation, and may yet have to encounter the expenses and distress of a harrowing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands."

It is the policy of the law not to expose certain classes of persons, or their acts and conduct in certain situations, to the harrowing uncertainty and vexation of litigation. In a certain sense it is true, as was said by Mr. Justice Holmes,<sup>1</sup> that the use of one's own land is conduct "of the most highly privileged kind." We have seen<sup>2</sup> that there are various cases of user causing damage beyond the borders of the land where the majority of courts refuse the sufferer permission to litigate even the question of the owner's motives. Are there not at least equal reasons for refusing permission to litigate the questions of attractiveness and prevention in the class of cases now under consideration?

It is true that a judge may sometimes rule that there is no evidence upon which the case can go to a jury. But if the qualified liability contended for is once admitted and is consistently applied, a judge can seldom withhold the plaintiff's case from the consideration of the jury. A question of fact, not of law, would generally be involved, and there would be a remarkable absence of definite tests.

What object is not attractive to children?<sup>3</sup> And how seldom can it be said that the attraction is not fraught with danger? "The average boy," said Mr. Justice Mitchell, "can make a plaything out of almost anything, and then so use it as to expose himself to danger."<sup>4</sup> Under this test, almost anything is attractive and dangerous which a jury may think fit to call so.<sup>5</sup>

<sup>1</sup> 8 HARVARD LAW REVIEW, 13.

<sup>2</sup> *Ante*, pp. 362, 363.

<sup>3</sup> "... the question suggests itself, what object or place is not attractive to very young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place, conveniently accessible for their congregation, is free from the restless feet of adventurous truants?" Gaines, C. J., in *Missouri, etc. R. Co. v. Edwards*, 1896, Texas, 36 Southwestern Rep. 430, p. 432. See also Hunter, J., in *Dublin, etc. Co. v. Jarrard*, 1897, Texas, 40 Southwestern Rep. 531, pp. 534, 535; Paxson, J., in *Gillespie v. McGowan*, 1882, 100 Pa. State, 144, p. 151; Valentine, J., in *Kansas C. R. Co. v. Fitzsimmons*, 1879, 22 Kansas, 686, pp. 690, 691.

<sup>4</sup> *Twist v. Winona, etc. R. R.*, 1888, 39 Minn. 164, p. 167.

<sup>5</sup> See *Denman, J.*, in *Dobbins v. Missouri, etc. R. Co.*, 1897, Texas, 41 Southwestern Rep. 62, p. 63.

What definite age can be named as the time when young children cease to be guided by instinct and become capable of self-protection?<sup>1</sup> How is the court to effectually restrain the tendency of the jury to attribute the conduct of *all* children to their childish instincts? No doubt a nonsuit can occasionally be ordered, or a verdict set aside as against evidence. But in the greater number of cases it will be found impossible to prevent these questions of childish instinct or capacity from going to the jury, and almost equally impossible to disregard their verdict.

What standard of care can be adopted that will not practically result in juries holding landowners to the responsibility of insurers? If the court simply instruct that the requirement is "reasonable care," then it is likely that "reasonable," in the opinion of the jury, will connote a superhuman amount of energy and foresight. And the effect will not be substantially different if the court give a fuller explanation of the term. If it be once conceded that a duty rests on the landowner to use care to keep children off his property, or to protect them while there from dangers arising from the usual condition of the premises, then it would be absurd to require of him so small an amount of care as would be unlikely to serve the end aimed at. If he is held to be under any duty in this regard, it is not likely to be set lower than this; viz., a duty to use such an amount of care, to use such precautions, as will render it improbable that harm will result to children attempting to enter upon his premises.<sup>2</sup>

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<sup>1</sup> It has been intimated that a child who knows that it is wrong for him to go upon railway premises and there play upon a turn-table, may yet recover for damage sustained in such play, unless he also knows that such use of the turn-table is dangerous. See Horton, C. J., in *U. P. R. Co. v. Dunden*, 1887, 37 Kansas 1, pp. 7, 8. But if the child is a conscious trespasser, though he may not be barred on the specific ground that he has been "negligent" (see Simpson, C. J., in *Bridger v. A. & S. R. Co.*, 1885, 25 So. Car. 24, pp. 32, 33), yet he cannot avail himself of the claim of "innocence" usually set up in his behalf. See Mitchell, J., in *Twist v. Winona, etc. R. Co.*, 1888, 39 Minn. 164. So if the child has been warned of danger, or forbidden (by parent or landowner) to enter, and is old enough to understand and remember the warning or prohibition, it would seem that his failure to appreciate the danger ought not to make the landowner liable. See *Newdoll v. Young*, 1894, 80 Hun, 364. But in *Price v. Atchison Water Co.*, 1897, Kansas, 50 Pacific Rep. 450, the fact that "a bright intelligent boy of about eleven" had been "frequently warned" by his parents of the danger of going to the reservoir, does not seem to have been considered sufficient to exonerate the landowner from liability for his drowning in the reservoir. See also *Dublin Cotton Oil Co. v. Jarrard*, Texas, 1897, 42 Southwestern Rep. 959.

<sup>2</sup> "If a child go uninvited upon a neighbor's property, and be drowned in his tank . . . or is injured while playing with his cane mill or corn sheller, and the court assume the affirmative of the first question above stated," *i. e.*, assume that the law

But this would, in truth, require in many cases precautionary measures which could not be carried out save at an expense, or in a manner, practically prohibitive of all beneficial user. "To hold that every piece of ground which contains some place or some thing that might be dangerous to children must be so fenced that children can enter only by what is practically a mode of siege, would be to lay an intolerable burden on proprietors."<sup>1</sup> Yet will any less efficacious method be regarded as affording reasonable probability that no child catastrophe will occur? It must be remembered that a jury will not reach this question unless they have already found that the premises were attractive and dangerous to children. Assuming the attractiveness and the danger, and assuming that the proprietor is under a duty to use care to guard children against this danger, can that duty be performed to the satisfaction of a jury, save by making his ground "practically impregnable" to children; in other words, "child-proof"?<sup>2</sup> But would not this, in many instances, compel the total cessation of profitable user? Take the case of an artificial pond, the creation of which was a practical necessity for manufacturing purposes, or to store water for stock or irrigation. "A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence<sup>3</sup> around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed."<sup>4</sup> Furthermore, the counsel for the plaintiff will urge that the very occurrence of the accident is in itself decisive evidence that reasonable care was not used to prevent it; and this application of the *res ipsa loquitur* doctrine, though an over-statement and discountenanced by the judge, is likely to carry controlling weight in the deliberations of the jury-room.

Suppose even that the judge goes still further (much further,

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imposes upon the owner a duty to use care to keep his property in such condition that persons going thereon without his invitation would not be injured, "the jury would in most cases be warranted in finding that the neighbor had not used reasonable care to so guard his tank, etc., or lock his cane mill or corn sheller, as to avoid such injury." Denman, J., in *Dobbins v. Missouri, etc. R. Co.*, 1897, Texas, 41 South-western Rep. 62, p. 63.

<sup>1</sup> See Lord Justice Clerk Macdonald in *Ross v. Keith*, 1888, 16 Scotch Session Cases, 4th Series, 86, pp. 89, 90.

<sup>2</sup> See 16 Scotch Session Cases, 4th Series, 86, pp. 89, 90.

<sup>3</sup> "No ordinary fence is much of an obstruction to an active boy." Carpenter, J., in *Nolan v. N. Y., etc. R. Co.*, 1885, 53 Conn. 461, p. 473. Compare *Doster, C. J.*, in *Price v. Atchison Water Co.*, 1897, Kansas, 50 Pacific Rep. 450, p. 452.

<sup>4</sup> Beatty, C. J., in *Peters v. Bowman*, 1896-1897, 115 California, 345, p. 355.



indeed, it is believed, than judges have generally gone), and tells the jury that, in determining what is reasonable care, they should take into account, not only the desirability of preserving innocent children from harm, but also the desirability of making beneficial use of land. How much weight will the jury allow to the latter consideration when put in competition with the former in a concrete case appealing to their sympathies? How much consideration will they give to the general impolicy of hampering the use of land with troublesome and expensive restrictions when they have before them a maimed child, or the mourning relatives of a deceased infant?

Where the existence of a legal duty is once admitted, the danger that a jury will be too swift to find a breach of it, does not afford a sufficient reason for abrogating the duty. But when the question under discussion is, whether a duty should be held to exist, whether in a particular class of cases the law ought to impose a duty; and when the case is confessedly on the border line, and other strong reasons can be given against establishing the duty, then the probability that the rule contended for would often be misapplied by juries, may well be given great, and even decisive, weight in influencing courts against the establishment of the alleged duty. Notable instances, where the court frankly admitted itself to be influenced by the consideration that practical injustice would frequently result from the recognition of an alleged doctrine, are to be found in the late decision of the New York Court of Appeals in *Mitchell v. Rochester R. Co.*,<sup>1</sup> and in the still more recent decision of the Massachusetts Supreme Court in *Spade v. Lynn & B. R. Co.*,<sup>2</sup> where Mr. Justice Allen said: "It would seem, therefore, that the real reason for refusing damages sustained from mere fright . . . probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. . . . But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice."<sup>3</sup>

All the really important arguments in favor of the child have now been considered. But, to make the discussion complete,

<sup>1</sup> 1896, 151 N. Y. 107; Martin, J., p. 110. Compare Sir Richard Couch in *Victorian R'y Com'rs v. Coultas*, 1888, L. R. 13 App. Cases, 222, p. 226.

<sup>2</sup> 1897, 168 Mass. 285, p. 288.

<sup>3</sup> See also Black, J., in *Kalen v. Terre Haute & I. R. Co.*, 1897, Indiana, 47 North-eastern Rep. 694, p. 698.

brief notice should, perhaps, be taken of certain other positions, although they do not seem to us entitled to any weight.

The maxim *sic utere tuo ut alienum non lædas* has been quoted as affording a decisive reason in favor of the child plaintiff; as establishing a duty on the landowner and *per se* justifying a recovery against him. To the argument founded on this maxim there is more than one answer. First: the maxim is of no value whatever as affording either a rule or a reason for the decision of cases. The criticisms upon it by such jurists as Austin, Erle, and Selden (quoted at length in 9 HARVARD LAW REVIEW, pp. 14, 15), demonstrate its utter worthlessness in these respects. Those criticisms, in brief, are: The maxim cannot be applied until after the case is decided, when it is no longer needed; it is not "workable" until after we have got a definition of "*tuo*" and "*alienum*," which are generally the very matters in dispute; if "*lædas*" means "injury," it is a merely identical proposition; and if "*lædas*" means "damage," it does not represent the real state of the law, being entirely inconsistent with any such conception as *damnum absque injuria*.<sup>1</sup> Second: Even if the maxim had any real worth, yet such an application would extend it to an entirely different class of cases from that to which it has usually been supposed applicable. "The maxim that a man must use his property so as not to incommode his neighbor, only applies to neighbors who do not interfere with or enter upon it."<sup>2</sup> It refers only to "acts the effect of which extends beyond the limits of the property."<sup>3</sup>

Sometimes it is said that the landowner is liable, because his use of his own land in a manner dangerous to intruding children constitutes a "nuisance." The introduction of this term solves no difficulty, but instead prolongs the controversy. The question, whether a nuisance or not, must be open for discussion; and it simply presents, in other phraseology, the original inquiry, viz., where the law ought to impose a duty or confer a remedy in such cases. "An actionable nuisance" is defined by Judge Cooley<sup>4</sup> as

<sup>1</sup> See also Mr. Justice Holmes, 8 HARVARD LAW REVIEW, 3.

<sup>2</sup> Clark, J., in *Frost v. Eastern R. R.*, 1886, 64 N. H. 220, p. 222.

<sup>3</sup> Vanderburgh, J., in *Ratte v. Dawson*, 1892, 50 Minn. 450, p. 453. See also Gibson, C. J., in *Knight v. Abert*, 1847, 6 Pa. State, p. 472. See also the *dictum* of Brett, L. J.: "The cases have decided that where that maxim is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land." *West Cumberland Iron, etc. Co. v. Kenyon*, 1879, L. R. 11 Chan. Div. 782, p. 787.

<sup>4</sup> *Torts*, 2d ed. 670.

"anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." To determine, then, whether there is a nuisance, it is necessary to consider whether the acts of the landowner are wrongful, and whether any legal rights of the child have been infringed, — the very points already under discussion.

It may be suggested that a class of cases of which *Lynch v. Nurdin*<sup>1</sup> is a type, should be considered as authorities against the landowner. In *Lynch v. Nurdin*, a man left his horse and cart unattended in the street. A child got upon the cart in play and was hurt. The owner was held liable. There the alleged "attractive" chattels were left in a public place, where the plaintiff and the defendant "had an equal right to be." But this is very different from the case where the owner leaves the chattel on his own land, where the child has no right to come. The distinction is clearly pointed out by Mr. Justice Peckham in *Walsh v. Fitchburg R. R.*<sup>2</sup>

Two attempts have been made to establish general propositions, which, if correct, would apply to adults as well as children, and would be broad enough to justify a recovery in the class of cases now under consideration. One is the much-discussed formula suggested by Lord Esher (then Brett, M. R.), in *Heaven v. Pender*.<sup>3</sup> The other is to be found in Ray on "Negligence of Imposed Duties — Personal," pp. 32 and 33. The objections to Lord Esher's proposed formula have been sufficiently stated by Mr. Beven in a note to the first edition of his work on Negligence;<sup>4</sup> and the proposition seems irreconcilable with a line of hitherto unquestioned authorities.<sup>5</sup> Furthermore, it may be remarked that the learned

<sup>1</sup> 1841, 1 Q. B. 29.

<sup>2</sup> 1895, 145 New York, 301, pp. 311, 312. See also Mr. Justice Collins, in *Ponting v. Noakes*, L. R. (1894), 2 Q. B. 281, pp. 290, 291.

Reference may be made here to some cases where the owner of property has been held not liable to children harmed by coming in contact with it, even though the contract occurred in a public place and not upon the owner's land. See *Hughes v. Macfie*, 1863, 2 Hurl. & Colt. 744; and the much-criticised decision in *Mangan v. Atterton*, 1866, L. R. 1 Exch. 239. See also *Gay v. Essex Electric Street R. Co.* (1893), 159 Mass. 238; *Bishop v. Union R. Co.* (1884), 14 R. I. 314; *Emerson v. Peteler* (1886), 35 Minn. 481; *Jefferson v. Birmingham, etc. Co.* (1897), Alabama, 22 Southern Rep. 546; *Rushenbergh v. St. Louis, etc. R. Co.*, 1892, 109 Missouri, 112.

<sup>3</sup> 1883, L. R. 11 Q. B. Div. 503, p. 509.

<sup>4</sup> Beven on Negligence, 1st ed. 63, note 1. See especially the latter part of the note.

<sup>5</sup> See Clerk & Lindsell on Torts, 2d ed. 399, note (c).



judge himself has since materially limited the scope of his original formula by declining to apply it to such cases as *Le Lievre v. Gould*.<sup>1</sup> Mr. Ray's broad statement would not, we think, be correct, even if confined to cases where both parties are in a place where they have an equal right to be, *e. g.*, a public highway or park. Taken in its literal terms, the proposed rule would seem to include inducement by the mere force of personal example. And when we pass from events transpiring on the public highway to acts done by a man upon his own land in making a use of that land which is otherwise reasonable and lawful, there is still less support for the general proposition.

Lastly, we ought to notice the unquestionable fact that some judges appear to have been largely influenced by the now exploded theories advanced in the report of the old case of *Lambert v. Bessey*,<sup>2</sup> whereby the law was supposed to regard the damage suffered by the plaintiff rather than the question whether the defendant was in fault. ". . . he that is damaged ought to be recompensed." Few modern judges have had the frankness of Lord Cranworth,<sup>3</sup> and hence these views have seldom been openly stated as the basis of decision; but they have, nevertheless, furnished the internal *ratio deducendi* in more than one modern case. It can scarcely be necessary, at the present day, to point out the objections to this mode of reasoning.<sup>4</sup>

Upon full consideration of all the grounds heretofore urged in favor of either view, it seems to us that the arguments in favor of the child are not equal in weight to the arguments in favor of the landowner. Our conclusion, therefore, is that the law ought not to impose upon the landowner even a qualified liability, so far as the condition of his premises is concerned, to children entering without permission, although "attracted" by his method of making beneficial use of his premises.

But though it be conceded that a rule imposing even a qualified liability would not work well if applied to all cases, still the ques-

<sup>1</sup> L. R. (1893) 1 Q. B. 491, p. 497. Compare Clerk & Lindsell on Torts, 2d ed. 412. See also Brett, L. J., in *West Cumberland Iron, etc. Co. v. Kenyon*, 1879, L. R. 11 Chan. Div. 782, p. 787.

<sup>2</sup> 31 Car. II., T. Raymond, 421, pp. 422, 423.

<sup>3</sup> See *Rylands v. Fletcher*, 1868, L. R. 3 H. L. 330, p. 341.

<sup>4</sup> See *Doe, J.*, in *Brown v. Collins*, 1873, 53 N. H. 442, pp. 445, 446.

tion may be raised whether such a rule cannot fairly be applied to special classes of cases, carefully limited and distinguished from the great mass. Various attempts will undoubtedly be made to map out such special classes; but it is believed that none of the attempted distinctions will be found tenable.

It may, for instance, be suggested that the landowner should be liable if his user were "non-natural;" and the well-known opinion of Lord Cairns, in *Rylands v. Fletcher*,<sup>1</sup> may be cited as an authority for this view. But to this suggestion there are two answers. First: Lord Cairns applied the test in reference to an entirely different subject; viz., the liability of a landowner where the effect of an act done by him on his own land has extended beyond his own boundary, and has caused damage to his neighbors who have not interfered with, or entered upon, his land. But in the case now under discussion the user is confessedly harmless to those who keep off the defendant's land, and the plaintiffs are persons who entered upon defendant's land without his permission. Second: The test itself is either hopelessly vague, or totally irreconcilable with the progress of civilization, or with anything save a return to savage life and primitive conditions. The criticisms of Mr. Justice Doe on this test have never been effectually answered.<sup>2</sup> To apply this test to determine a man's liability to intruders upon his soil would impose a heavy burden upon agricultural and mechanical industry, and would be "putting enterprise at the mercy of juries."

A distinction somewhat like that just commented upon was attempted by Chief Justice Beatty, in the recent case of *Peters v. Bowman*.<sup>3</sup> But his distinction, so far as it is not founded in the novelty of the use, would seem to rest largely on degrees of danger; and must finally be applied by the jury rather than the judge. An attempt to apply it would, it is believed, be open to most of the objections we have heretofore urged.

Possibly efforts will be made to have the courts rule that certain common modes of user shall be deemed extra-hazardous, and that in cases falling within this class of extra-hazardous uses the landowner shall be liable even to intruders. This doctrine would apply to adult intruders as well as to children; and hence the propriety of its adoption is hardly a subject for extended discussion in this

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<sup>1</sup> 1868, L. R. 3 H. L. 330, p. 339.

<sup>2</sup> Doe, J., in *Brown v. Collins*, 1873, 53 N. H. 442, p. 448. See also Mr. J. M. Gets, in 33 Am. Law Reg. & Rev. N. S. p. 103.

<sup>3</sup> 1896-1897, 115 Calif. 345, pp. 356, 357.

article, where we are considering whether the landowner should be held responsible to children in cases where he would not be liable to an adult under similar circumstances.<sup>1</sup> But it may be suggested that the attempt made in *Rylands v. Fletcher*<sup>2</sup> to establish a broad class of extra-hazardous uses in cases where the user operated to cause damage outside the borders of the land, has not been such a complete success as to encourage its extension to a different kind of damages, viz., the damages done to intruders upon the land where the user takes place. The scope of the "wide and stringent rule" in *Rylands v. Fletcher* has been limited by subsequent English decisions. "In every case of the kind which has been reported since *Rylands v. Fletcher*, that is, during the last twenty-five years, there has been a manifest inclination to discover something in the facts which took the case out of the rule. There are some authorities which are followed and developed in the spirit, which become the starting-point of new chapters in the law; there are others that are followed only in the letter, and become slowly but surely choked and crippled by exceptions."<sup>3</sup> And in this country the rule has been decisively rejected in several States.<sup>4</sup>

If a landowner whose premises are adjacent to a public highway makes changes on his land endangering the safety of travellers who accidentally deviate from the public way, he may be held liable for damage sustained in case of such accidental deviation.<sup>5</sup> But he is not liable to an adult traveller who is "attracted" to the land by the owner's mode of using his premises. It is sought, in the case of children, to extend the responsibility of the owner of land adjacent to a highway by making him liable, not merely to those who accidentally deviate from the highway, but also to those who intentionally enter upon his land, if they are drawn thither by so-called "attractions." It is suggested that "the child obeying its instinct" may be regarded "as in the same position as a person who, without negligence, falls off the highway" into an adjoining pit. This claim, it seems to us, is merely a repetition of the contention already urged in behalf of children who pass from private premises to the defendant's land. Unless the child can, in that case, successfully

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<sup>1</sup> *Ante*, p. 349.

<sup>2</sup> 1868, L. R. 3 H. L. 330.

<sup>3</sup> Pollock's Law of Fraud in British India, 53, 54.

<sup>4</sup> See the acute conjecture of Mr. E. R. Thayer, in 5 HARVARD LAW REVIEW, 186, note 1, as to the probable future of the rule laid down in *Rylands v. Fletcher*.

<sup>5</sup> Some cases apply the doctrine only under very narrow limitations, as to the proximity of the danger to the highway and the extent of the deviation.



distinguish his position from that of the adult, he cannot do so here.<sup>1</sup> In both cases the question is, whether a duty is due from the landowner to a child where no duty is due to an adult. The establishment of such a duty seems open to most of the objections urged in the former case. The rule as to liability to travellers accidentally deviating from the highway is itself in the nature of an exception to the general immunity of landowners, and is of very limited application, entailing only a comparatively trifling burden. The proposed extension would be much more onerous to the landowner, and it is believed that the existence of such a liability has never been taken into account in assessing damages for the laying out of highways.

(Whether a municipality, resting under a statutory obligation to keep a highway in safe condition for travel, is liable for not erecting barriers adequate to prevent "discretionless, unattended children" from straying off the highway upon adjacent premises, is a different question from the one just discussed as to the duty of the adjacent owner. The difference is illustrated by *Clark v. Manchester*.<sup>2</sup> In that case the city itself happened to be the owner of the alleged dangerous premises adjacent to the highway. The court held that the city *quâ* owner was not liable. The plaintiff amended his declaration by adding a count<sup>3</sup> which stated a case for an injury from an insufficiently guarded highway, the count being based on the statutory obligation of the municipality to keep the highway in safe condition for travel. Upon this count the plaintiff was allowed to go to the jury,<sup>4</sup> and finally recovered judgment.<sup>5</sup> Upon the question, whether a public body, under a statutory duty to keep highways in suitable repair, is bound to make special provision for the safety of children too young to take care of themselves, there is a seeming conflict of authority.)<sup>6</sup>

<sup>1</sup> "The same principle applies whether the unauthorized entry be made on private grounds, with private grounds as a medium of reaching the locality where the injury occurs, as applies where a public street is used for a like purpose." *Sherwood, J.*, in *Moran v. Pullman, etc. Co.*, 1896, 134 Missouri, 641, p. 651.

<sup>2</sup> 1882-1883, 62 N. H. 577; 1887, 64 N. H. 471.

<sup>3</sup> 62 N. H., p. 581.

<sup>4</sup> 62 N. H., pp. 581-584.

<sup>5</sup> 64 N. H. 471.

<sup>6</sup> The tendency of the following cases is against the existence of such an obligation: *Maginnis v. City of Brooklyn*, 1889, 7 N. Y. Supplement, 194; affirmed without opinion, 1891, 126 N. Y. 644; *Gavin v. Chicago*, 1880, 97 Ill. 66; *Oil City, etc. Bridge Co. v. Jackson*, 1886, 114 Pa. State, 321; *Clark v. City of Richmond*, 1887, 83 Virginia, 355. See also *Gaughan v. Philadelphia*, 1888, 119 Pa. State, 503.

The following cases tend, either by their reasoning or their result, to support a con-

Which way the weight of American authority inclines upon the main question considered in this article, is an inquiry not easily answered. When the subject first began to be discussed, the tendency was in favor of holding the landowner liable. The opinion of the Supreme Court of the United States in the Stout case, in 1873,<sup>1</sup> was reinforced in 1875 by the far abler opinion of the Supreme Court of Minnesota, in the Keffe case.<sup>2</sup> These two comparatively early decisions exerted much influence on other courts. Subsequently some courts which originally adopted this view began to call a halt. And in very recent years the tendency of the decisions seems in the opposite direction. But there has never been unanimity among the different States, and in some States the court can hardly claim the merit of consistency. Tribunals, which have held the owner liable to children hurt while playing on turn-tables, have held him free from liability in cases not easily distinguishable in principle. It is difficult to tell on which side of the line to place certain decisions. The fact that the final result of a particular case was in favor of the landowner does not always furnish conclusive evidence of the position of the court upon the main question. The court may have held that, even if the alleged rule exists, the plaintiff has not made out a case falling within it. Hence it was unnecessary to pass directly upon the question of the existence of such a rule. The decision may have been put upon the ground that there was not sufficient evidence of attractiveness, or not requisite proof that plaintiff was actuated solely by childish instincts, or not satisfactory evidence that defendant failed to take reasonable precautions. Decisions based upon such grounds can hardly be regarded as direct judicial affirmations that the rule exists, and that it would be applied to a case falling completely within its terms. Nor, on the other hand, can one feel sure that the court which thus disposes of the particular case would not fully endorse the rule if there were no escape from squarely meeting that issue.

Many of the American authorities are collected in the note

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trary view: *Clark v. Manchester*, *ubi sup.*; *Greer v. Stirlingshire Road Trustees*, 1882, 9 Scotch Session Cases, 4th Series, 1069. See, however, comments in Glegg's *Law of Reparation*, pp. 247, 248, where the author says: "Probably the correct view of the law is to be found in Lord Young's dissent in *Greer's case*."

See also *City of Omaha v. Richards*, 1896, 49 Nebraska, 244; affirmed, 1897, 50 Nebraska, 804.

<sup>1</sup> 17 Wallace, 657.

<sup>2</sup> 21 Minn. 207.

below, which does not purport to include cases where the decision was based on the existence (whether rightly or wrongly found) of either an actual invitation or an actual license.

NOTE. — We give first the "turn-table cases" grouped by themselves.

Where railroad turn-tables have been left insecurely fastened, and children have been hurt while playing on them, the railroad company has been held liable in the following jurisdictions: —

U. S. Supreme Court: *Sioux City, etc. R. Co. v. Stout*, 1873, 17 Wallace, 657, affirming 2 Dillon, 294.

Minnesota: *Keffe v. Milwaukee & St. P. R. Co.*, 1875, 21 Minn. 207; *O'Malley v. St. P., etc. R. Co.*, 1890, 43 Minn. 289.

Missouri: *Koons v. St. L., etc. R. Co.*, 1877, 65 Missouri, 592; *Nagel v. M. P. R. Co.*, 1882, 75 Missouri, 653.

Kansas: *Kansas, etc. R. Co. v. Fitzsimmons*, 1879, 22 Kansas, 686; *U. P. R. Co. v. Dunden*, 1887, 37 Kansas, 1.

Texas: *Evansich v. G. R. R.*, 1882, 57 Texas, 126; *Gulf, etc. R. Co. v. McWhirter*, 1890, 77 Tex. 356; *Fort Worth, etc. R. Co. v. Measles*, 1891, 81 Tex. 474.

Georgia: *Ferguson v. Columbus & Rome R'y*, 1885-1886, 75 Ga. 637; *S. C.* 77 Ga. 102.

Washington: *Ilwaco R. & W. Co. v. Hedrick*, 1890, 1 Washington, 446.

California: *Barrett v. Southern Pacific R. Co.*, 1891, 91 Calif. 296.

South Carolina: *Bridger v. A. & S. R. Co.*, 1885, 25 South Carolina, 24.

Nebraska: 1881, *A. & N. R. Co. v. Bailey*, 11 Nebraska, 332 (judgment for original plaintiff was reversed, and case remanded for new trial; but court adopt doctrine of *R. R. v. Stout*, *ubi supra*).

In the following jurisdictions liability in turn-table cases has been denied: —

New Hampshire: *Frost v. Eastern R. Co.*, 1886, 64 N. H. 220.

Tennessee: *Bates v. Nashville, etc. R. Co.*, 1891, 90 Tenn. 36.

Massachusetts: *Daniels v. N. Y. & N. E. R. Co.*, 1891, 154 Mass. 349.

New York: *Walsh v. Fitchburg R. Co.*, 1895, 145 N. Y. 301.

Liability was also denied in *R. R. v. Bell*, 1876, 81 Illinois, 76, in view of "the isolated position" of the turn-table in question.

In cases of alleged "dangerous attractions," other than turn-tables, decisions adverse to the landowner have been given in the following instances: —

*Birge v. Gardiner*, 1849, 19 Conn. 507; *Whirley v. Whiteman*, 1858, 1 Head, Tenn. 610; *Mullaney v. Spence*, 1874, 15 Abbott's Practice Rep. N. S. 319; *Hydraulic Works Co. v. Orr*, 1877, 83 Pa. State, 332; *Powers v. Harlow*, 1884, 53 Mich. 507; *Bransoms' Adm'r v. Labrot*, 1884, 81 Ky. 638; *Schmidt v. Kansas City Distillery Co.*, 1886, 90 Missouri, 284; *Mackey v. City of Vicksburg*, 1887, 64 Miss. 777; *Harriman v. Pittsburgh, etc. R. Co.*, 1887, 45 Ohio State, 11; *Brinkley Car Co. v. Cooper*, 1895, 60 Arkansas, 545; *Price v. Atchison Water*



Co., 1897, Kansas, 50 Pacific Reporter, 450 (possibly to be regarded as decided partly on the ground of tacit license); *City of Pekin v. McMahon*, 1895, 154 Ill. 141. (And see Phillips, C. J., in *Siddall v. Jansen*, 1897, Illinois, 48 North-eastern Rep. 191, p. 192.) *Dublin, etc. Co. v. Jarrard*, 1897, Texas, Court of Civil Appeals, 40 Southwestern Rep. 531.

In the following cases of alleged dangerous situations, other than turn-tables, the decisions have been favorable to the landowner:—

*Hargreaves v. Deacon*, 1872, 25 Mich. 1; *Central, etc. R. Co. v. Henigh*, 1880, 23 Kansas, 347; *Haesley v. R. R.*, 1891, 46 Minn. 233; *McEachern v. R. R.*, 1890, 150 Mass. 515; *Catlett v. St. Louis, etc. R. Co.*, 1893, 57 Arkansas, 461; *Barney v. H. & St. J. R. R.*, 1894, 126 Missouri, 372; *McAlpin v. Powell*, 1877, 70 N. Y. 126; *Gillespie v. McGowan*, 1882, 100 Pa. State, 144; *Clark v. Manchester*, 1882-1883, 62 N. H. 577; *Charlebois v. Gogebic, etc. R. Co.*, 1892, 91 Mich. 59; *Overholt v. Vieths*, 1887, 93 Missouri, 422; *Greene v. Linton*, 1894, 27 N. Y. Supp. 891; *Grindley v. McKechnie*, 1895, 163 Mass. 494; *Richards v. Connell*, 1895, 45 Nebraska, 467; *City of Omaha v. Bowman*, 1897, Nebraska, 72 Northwestern Rep. 316; *Moran v. Pullman, etc. Co.*, 1896, 134 Missouri, 641; *Klix v. Nieman*, 1887, 68 Wis. 271; *Missouri, etc. R. Co. v. Dobbins*, 1896, Texas Court of Civil Appeals, 40 Southwestern Rep. 861; affirmed in Supreme Court of Texas, 1897, 41 Southwestern Rep. 62; *Peters v. Bowman*, 1896-1897, 115 Calif. 345; *Newdell v. Young*, 1894, 80 Hun, 364; *Ratte v. Dawson*, 1892, 50 Minn. 450. (Compare *Talty v. City of Atlantic*, 1894, 92 Iowa, 135, and *Hawley v. Same*, 1894, 92 Iowa, 174.) *Robinson v. Oregon, etc. R. Co.*, 1891, 7 Utah, 493; *Rodgers v. Lees*, 1891, 140 Pa. State, 475; *Springer v. Byram*, 1893, 137 Ind. 15; *Chicago, etc. R. Co. v. Bockham*, 1894, 53 Kansas, 279; *Fredericks v. Illinois, etc. Co.*, 1894, 46 La. Ann. 1180; *Gulf, etc. R. Co. v. Cunningham*, 1894, 7 Texas Civil Appeals Rep. 65; *Slayton v. Fremont, etc. R. Co.*, 1894, 40 Nebraska, 840; *O'Connor v. Illinois Central R. Co.*, 1892, 44 La. Ann. 239; *Witte v. Stifel*, 1894, 126 Missouri, 295; *McGuinness v. Butler*, 1893, 159 Mass. 233; *McCaul v. Bruner*, 1894, 91 Iowa, 214; *Missouri, etc. R. Co. v. Edwards*, 1896, Supreme Court of Texas, 36 Southwestern Rep. 430; *Holbrook v. Aldrich*, 1897, 168 Mass. 15.

See also *Bedle, J.*, in *Vanderbeck v. Hendry*, 1871, 34 New Jersey Law, 467, p. 473. *Adams, J.*, in *Wood v. Ind. School District*, 1876, 44 Iowa, 27, pp. 31, 32; *Mergenthaler v. Kirby*, 1894, 79 Maryland, 182.

*Jeremiah Smith.*

## MALICE AND UNLAWFUL INTERFERENCE.

THE decision in the case of *Allen v. Flood*,<sup>1</sup> rendered by the House of Lords in December, 1897, is the most recent judicial contribution to an interesting chapter in the law of torts. The question presented in the case was: Is it unlawful for one person to interfere with the employment of another where the act of interference induces no breach of contract and is not accompanied by either fraud or violence? The House of Lords answers this question in the negative. The case aroused a considerable popular interest for the reason that it was generally regarded as a test case upon the right of trade-unions to interfere between employers and employees. It appears, however, from the facts as established by the evidence, that no question of trade-unions' rights or liabilities was presented, and that the decision proceeded upon considerations somewhat technical in their nature, and which the public at large may perhaps fail to appreciate.

The facts of the case were, briefly stated, these: The plaintiffs, Flood and Taylor, were shipwrights doing both wood and iron work on vessels of all kinds. In many English docks, including the Glengall Iron Company's Regent Dock in London, it is customary that wood and iron work is done by separate sets of men, and the plaintiffs, when employed in that dock, did woodwork exclusively. They were so employed in April, 1894, together with other shipwrights, among them a number of boilermakers exclusively engaged on iron-work, the employment being by the job, but subject to termination at the will of the employer. The boilermakers belonged to a powerful union consisting of forty thousand members. This union was strongly opposed to the same men doing both wood and iron work. It became known to some of the boilermakers that Flood and Taylor had been employed in a dock where wood and iron work was done by the same men, and where they had presumably worked on both. Allen, the defendant, a delegate of the Boilermakers' Union, was informed of the fact, and asked the manager of the Glengall company to discharge Flood and Taylor, warning him that otherwise all the boilermakers would be called out. The man-

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<sup>1</sup> Times Law Reports, Dec. 15, 1897.

ager complied, and Flood and Taylor were discharged. It appeared from the evidence that the members of the Boilermakers' Union constituted by far the greater portion of the force employed by the Glengall Iron Company. The manager understood from what Allen said, "that he had only to hold up his finger and all the men would knock off, and that he would call the men out if Flood and Taylor were not discharged, and he believed the threat would be enforced unless he submitted and discharged them at once," so that he virtually acted upon Allen's dictation. The discharged men thereupon brought action against Allen, and joined as defendants, Knight, the general secretary, and Jackson, the chairman of the union; but the evidence failed to show that the latter were responsible either for Allen's appointment or for his action. As it was assumed that the Glengall Iron Company had the right to terminate the contract with the plaintiffs at any time, there remained as the only cause of action that the defendant maliciously induced the company not to employ the plaintiffs, and upon this latter theory the case was considered on appeal.

The case was first tried in the Queen's Bench Division before Justice Kennedy and a jury.<sup>1</sup> The jury having answered the question, whether Allen maliciously induced the company to discharge or not to engage the plaintiffs, in the affirmative, judgment for damages was given against the defendant, who thereupon appealed. In the Court of Appeal, where the case was argued in 1895, this judgment was affirmed by three judges, Lord Esher, the late Master of the Rolls, writing the principal opinion.<sup>2</sup> The case came before the House of Lords, December, 1895, and there being a diversity of opinion, a rehearing was had in March, 1897, and the exceptional course was resorted to of asking eight judges of the High Court to hear the argument and tender their advice. Of these eight judges, six gave their opinion in favor of affirmance, two in favor of allowing the appeal.<sup>3</sup> But now the Lords reverse the original decision by a vote of six to three, the Lord Chancellor siding with the minority, while Lord Herschell, a former Lord Chancellor, pronounces in favor of Allen. Of the twenty-one judges who heard the case in all its stages, thirteen — of whom three were law lords — held there was a good cause of action, and only eight — but six law lords among them — denied the existence of an actionable wrong.

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<sup>1</sup> 64 L. J. Q. B. 666.

<sup>2</sup> *Ibid.* 672.

<sup>3</sup> The principal opinions were printed in the London Times of Sept. 4, 1897.



According to the theory of the lower courts and the dissenting judges, every one has a right to employ his labor and pursue his occupation free from undue interference. The interference is undue when it is without just cause or excuse. The absence of just cause and excuse in an act calculated and intended to cause damage constitutes malice; and if damage results, a cause of action arises. The right contended for depends, therefore, upon the spirit or motive of the act by which it is disturbed. "If," the Lord Chancellor says, "the representative of the men (Allen) had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union, because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did."

This theory is held to be the logical result of a series of earlier decisions, principally the cases of *Lumley v. Gye*,<sup>1</sup> *Bowen v. Hall*,<sup>2</sup> and *Temperton v. Russell*.<sup>3</sup> In *Lumley v. Gye* it had been held that to induce a person engaged to render personal services to break his contract, gives to the other party to the contract a cause of action. In *Bowen v. Hall* the Court of Appeal affirmed this doctrine, and extended it to the inducement of breaches of contracts other than for personal services. In *Temperton v. Russell*, likewise decided by the Court of Appeal, it was charged that there had been inducement, not only to break existing contracts with the plaintiff, but also not to enter into new contracts with him; but as far as the prevention of new contracts was concerned, that was also charged to have been brought about by combination and conspiracy, and this element entered clearly into the decision.

It appears that in each of these cases there was a violation of a right more tangible than merely the unobstructed opportunity to form relations with others, that the right violated was a subsisting contractual relation. These cases, therefore, simply establish the principle that a contractual obligation operates not merely upon the person bound to performance, but upon every one else, in so far as he must not procure a breach of that obligation; the right *in*

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<sup>1</sup> 1853, 2 Ell. & Bl. 216.

<sup>2</sup> 1881, 6 Q. B. D. 333.

<sup>3</sup> 1893, 1 Q. B. D. 715.

*personam* is thus made in another aspect a right as against the whole world. This principle was certainly a new one, for the old rule against enticing away a servant was based upon the peculiar economic and social status of menial employees, and the advance was resisted by dissenting judges. It must also be admitted that the principle is not quite free from difficulty, for the conception of the violation of a right *in personam* by a third party is somewhat strained; still it is intelligible that the law should impose a general duty to abstain from procuring violations of existing contracts. As a matter of fact, however, the decisions mentioned did not express the principle unqualifiedly in this way; it was intimated in *Bowen v. Hall* that it might be lawful to persuade another to break his contract, and stress was laid in all three cases upon the *malicious* procurement of the violation. "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act if injury ensues from it. The act complained of in the present case is therefore, because malicious, wrongful."<sup>1</sup> That the violation of an existing contract was procured, seemed not so important as that there was a malicious procurement of something which led to damage and injury. Therefore it was also said by one of the judges in the later case of *Temperton v. Russell*, with reference to the charge that the formation of new contracts had been prevented: "I am unable to see any distinction in principle between forcing a person to break an existing contract and preventing a person from entering into future contracts. In both cases there is the same wrongful, because malicious, intent."<sup>2</sup> It will, however, be remembered that, with reference to the prevention of these future contracts, the cause of action was conspiracy, and the liability was recognized on that ground.

*Flood v. Allen* was the first case in which the question was presented: Is it actionable for one man to induce another to terminate a contract which is subject to termination at pleasure, — to induce, in other words, a lawful and not an unlawful act, merely because the inducement is coupled with an intent to injure? The judges who held for the plaintiff believed that they were carrying the previous cases only to their logical conclusion, if they applied the doctrine that malice was actionable to the facts of

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<sup>1</sup> *Bowen v. Hall*, per Lord Brett.

<sup>2</sup> 62 L. J. Q. B. 412, per Lord Esher.

the present case; and there were undoubtedly strong *dicta* to support them in that view. They had, moreover, two old cases to rely upon, which might be used as authorities for the proposition that malice constitutes a cause of action: *Carrington v. Taylor*<sup>1</sup> and *Keeble v. Hickeringill*.<sup>2</sup> Both were cases in which a liability was enforced for wilfully discharging firearms near a decoy pond of another person for the purpose of driving away ducks or other wild-fowl that might otherwise have come there. The opinion in *Keeble v. Hickeringill* was delivered by Holt, C. J., who expressed himself very strongly in favor of liability for malicious acts damaging another, though no definite or tangible right is invaded. "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." Violence and malice are thus placed on a par, and the pursuit of a livelihood or a lawful calling declared to be a right protected as against others. The test of malice is the absence of lawful justification or excuse; any one may cause damage and loss of profit to a schoolmaster by setting up a rival school, but he becomes liable if without such justification, from spite or ill-will, he induces the scholars to stay away from the school. Great reliance was placed on the *Hickeringill* case and the illustrations given in Holt's opinion, in order to prove the actionable character of malicious interference with another person's livelihood.

At the same time it had to be admitted that malice does not always constitute a cause of action. When the malicious act consists in a use of one's property not otherwise forbidden by law, there is no redress. So if instead of discharging firearms to drive the wild-fowl away from his neighbor's decoy pond, a man sets up a decoy pond on his own land for the same purpose, the law will not inquire into motives. That a person may stop the percolation of underground waters from his own to his neighbor's land, was established by the decision in *Chasemore v. Richards*,<sup>3</sup> and that the evident purpose of such action is to impair a city's water supply, and force the city to buy the land of the interfering owner, makes no difference.<sup>4</sup> "The only question," Lord Justice Lindley said in the case last mentioned, "a court of law or equity can consider is whether the defendant has a right to do what he threatens and

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<sup>1</sup> 11 East, 571 (1809).

<sup>2</sup> Decided 1706, reported fully in a note to *Carrington v. Taylor*.

<sup>3</sup> 7 H. L. C. 349 (1859).

<sup>4</sup> *Mayor of Bradford v. Pickles*, 64 L. J. Ch. 101 (1895).



intends to do. If he has, he cannot be interfered with, however selfish, vexatious, or even malicious his conduct may be. This is not one of those cases in which an improper object or motive makes an otherwise lawful act actionable."

According to this distinction the tortious character of malice would depend not merely upon the interest invaded or impaired, or upon the motives dictating the act, but further upon the difference of acting in the exercise of property rights and acting apart from this tangible basis of right.

What, then, is the precise meaning of malice as a tort, according to the authorities cited? The idea seems to be that there must be some interference with a lawful occupation from which loss and damage results; that this interference must not merely consist in some mode of using one's own property, especially one's own land; and that the interference must proceed from some intent to injure. If the damaging act invades some right otherwise protected by means otherwise unlawful, if it constitutes trespass, nuisance, libel or slander, or fraud, the gist of the action is not malice pure and simple, but the liability is based upon conditions and circumstances which can be defined without reference to motive and disposition, although motive may enter into the act otherwise defined, as a qualifying and decisive element, as it does in certain forms of libel and slander; but here we have to deal with cases in which the existence or non-existence of a protected right depends entirely upon the motive, disposition, or state of mind of one person with reference to another.

It is this conception of malice which the House of Lords now declares untenable. It is declared that the unlawfulness of an act cannot be made to depend solely upon the intent with which it is done, if there is no impairment of a right otherwise definable. Malice cannot constitute a cause of action by itself, although it may enter as an essential element into other causes of action. Thus, where a libellous communication is made under qualified privilege, it is necessary to show malice to establish liability; but malice is here only required to destroy a privilege: eliminate the privilege, and a clear legal wrong, because the invasion of a clear right, remains, apart from malice. But in *Allen v. Flood*, as it appeared to the House of Lords, there was, apart from malice, no right sufficiently definite to require or be entitled to legal protection, and malice by itself was not recognized as a legal cause of action.

In point of authority and precedent, the House of Lords treated the expressions of opinion in *Lumley v. Gye* and *Bowen v. Hall* as

mere *dicta*, and properly so, since aside from the question of malice, a definite right, an existing contractual relation, had been disturbed in each of these cases. *Temperton v. Russell*, in so far as the cause of action was the inducement not to enter into new contracts, was a case of conspiracy. In so far as it seems to hold such inducement actionable irrespective of conspiracy, Lord Herschell holds that there is a chasm between it and the preceding cases, and that it made an entirely new departure. A more serious difficulty might have been presented by *Keeble v. Hickeringill*, but the House of Lords passed over it lightly. "I am very far from suggesting," Lord Watson said, "that the antiquity of a decision furnishes a good objection to its weight; but it is a circumstance which certainly invites and requires careful consideration, unless the decision is directly in point, and its principle has since been recognized and acted upon." Lord Herschell ignores the case. Lord Macnaghten says: "There is not much help to be found in the earlier cases that were cited at the bar, — not even, I think, in the great case about frightening ducks in a decoy, whatever the true explanation of that decision may be."

In point of principle the House of Lords insists that there cannot be a legal wrong without a legal right, and that a right to be protected against malice should not be recognized, as long as malice is not a definite legal conception. The vice and defect of the overruled opinions had been that neither the right nor the wrong had been clearly defined. "We have been invited to define malice," Lord Esher said in the Court of Appeal. "The Court will not define malice any more than it will define fraud. All plain men know what is meant by saying that a man has acted maliciously. . . . The jury had a right to find, as they have found, that Allen acted maliciously." This attitude is squarely opposed by Lord Herschell. "If acts are or are not unlawful and actionable, according as this element of malice be present or absent, I think it is essential to determine what is meant by it. I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were."

The *Mogul Steamship Company* case <sup>1</sup> is cited repeatedly in the

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<sup>1</sup> *Mogul S. S. Co. v. McGregor, Gow, & Co.*, 1892, App. Cas. 25, 61 L. J. Q. B. 295.

various opinions; some of its *dicta* are relied upon by the lower courts and dissenting judges, the decision itself by the House of Lords. The case is really not in point, but it is instructive, and throws considerable light upon the whole problem under discussion. In that case the defendants had formed a combination of steamship companies engaged in the China trade, from which the plaintiffs had been excluded. The defendants gave notice to the China merchants that any shipments by plaintiffs' vessels would debar them from the benefit of certain rebates otherwise granted by defendants, they threatened that they would not employ any agents who would take any orders for plaintiffs, and began to charge low and ruinous rates of shipment in order to underbid plaintiffs and drive them out of the trade. The action was dismissed on the ground that the acts complained of were legitimate forms of competition incident to the ordinary course of business. Two elements distinguished that case from the present one: the absence of malice, and the presence of a combination. There was found to be no element of personal ill-will, and it was held that competition, which is a hand-to-hand fight in which the gain of the one is the loss of the other, to become unlawful, must descend to fraud, intimidation, obstruction, molestation, oppression, or intentional procurement of the violation of individual rights, and that the mere offer of a premium on exclusive dealings with defendants was not sufficient to satisfy these requirements. The acts not being unlawful if they had been done by one, were not rendered illegal by being done by several in combination. It was strongly intimated that proof of malice might have altered the aspect of the case, although it does not clearly appear whether malice would have rendered the conduct of defendants actionable *per se*, or only in conjunction with the element of combination or conspiracy.

Evidently this last point presents a question of vital interest and importance. It has now been decided by the House of Lords that malice *per se* does not constitute a cause of action; how as to malice in conjunction with combination? Does, in other words, preconcerted malicious action by several, resulting in injury to another, but lacking every element of violence, fraud, or threat of violence, present a case of actionable conspiracy?

In two, at least, of the prevailing opinions delivered in the House of Lords the view is intimated that the case might have been decided otherwise on a charge of conspiracy. Lord Shand said: "The case was not presented by the learned judge to the jury as



one of conspiracy, and does not raise any question of that kind. . . . Combination for no legitimate trade object (such as occurred in the *Mogul Steamship Company* case), but in pursuit really of a malicious purpose to ruin or injure another, would, I should say, be clearly unlawful; but this case raises no such question." And Lord Macnaghten says: "In order to prevent any possible misconstruction of the language I have used, I should like to add that, in my opinion, the decision of this case can have no bearing on any case which involves the element of oppressive combination."

The question then presents itself: Do the objections urged by the House of Lords against the recognition of malice as a cause of action disappear, when malice is charged against several instead of one? If the difficulty felt by the House of Lords was that an act should not become unlawful merely on account of the spirit or motive which dictated it, because that element does not furnish a satisfactory test of illegality, and may open the door to arbitrary decisions, the objection applies equally, it would seem, whether the act of one or the act of a number of people is in question.

At the same time, this answer does not dispose of the whole question. It may still be that a malicious act by several is actionable where the same act done by one would not be, not because the theory of malice suddenly loses its difficulty, but because the fact of combination imports a new and vital element.

That an act lawful if done by one should become unlawful if done by a number of persons, involves no contradiction in itself, if the act, through being done by many in concert and co-operation, assumes a new and different character. The withdrawal of patronage, the refusal to entertain social and business relations, the discrimination between different persons in making contracts of employment or otherwise, advice, recommendations, encouragement, or warnings addressed to other persons, — all these acts are expressions of individual liberty, and are lawful because without them our social and economic relations would be subjected to intolerable and arbitrary restraints. But let the same acts be done by a large number of people in accordance with preconcerted resolutions, and in organized co-operation, — and the withdrawal of relations means social isolation, discrimination is turned into persecution, the freedom of private relations into a violation of privacy, the liberty of contract into a dangerous and oppressive use of economic power. In these cases combination may make the act unlawful, not because it is malicious, but because it affects and changes the character of

the act. Upon this basis a "boycott" may be held to be illegal and even criminal, while the case of two brothers wishing to prevent their sister from concluding an unsuitable marriage, and threatening for this purpose to give up all intercourse with her if she persists in her choice, would present no element of illegality. The technical definition of conspiracy which simply speaks of "combining" is open to the objection that it does not sufficiently discriminate between combinations which are purely private agreements or understandings and combinations which assume a public or quasi-public aspect.

The Mogul Steamship Company case was held to involve no combination of the latter kind, the case of *Allen v. Flood* no combination whatever. "The vice of that form of terrorism," Lord Macnaghten said in the latter case, "commonly known by the name of 'boycotting,' and other examples of oppressive combination, seems to depend on considerations which are, I think, in the present case conspicuously absent." The overruled opinions, however, reveal a strong undercurrent of sentiment that the action presented a case of oppression similar to a boycott, and public opinion regarded the case very clearly as one involving the practices and the power of trade-unions. Allen's warning would never have been heeded or acted upon if it had not been supposed that he had forty thousand boiler-makers to back it up. The action was originally brought against the officers of the union, but the evidence failed to show that they sustained toward Allen the relation of principals, or that the union had authorized his action. That the idea of an oppressive combination was strong in the minds of the dissenting judges appears from the following quotation from the Lord Chancellor's opinion: "If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that the action of an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats; so that if they in truth authorized him, he and they might all have been responsible, while the false statement that he made, though acting

upon the employer by some pressure because it was believed, and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false." But this point seems to be fully disposed of by Lord Herschell's answer: "It was said that the appellant had been guilty of misrepresentation, which had induced the company to take the course they did. No such point is to be found suggested in the pleadings, no such point was raised at the trial or in the Court of First Instance, or until the junior counsel of the respondents addressed your Lordships. The jury were not asked whether there had been a misrepresentation, and have not found that this was the case. It is certainly not admitted by the appellant. Under these circumstances it would, in my opinion, be without justification and contrary to precedent to attach any weight to the point now." If the point had been brought before the court properly, it would have made a case of fraud or misrepresentation producing damage, and for which a liability might have been enforced; if it could have been shown that Allen acted under authority, a case of actionable conspiracy could probably have been made out; as it was, the plaintiffs presented, and the evidence substantiated, a case so favorable to the defendant, that malice remained as the only available cause of action.

The Lord Chancellor, in his dissenting opinion, cited a number of American cases. The questions raised in *Allen v. Flood* have indeed repeatedly engaged the attention of American courts. A collection of the principal authorities down to 1894 may be found in an article by W. L. Hodge on "Wrongful Interference by Third Parties with the Rights of Employers and Employed."<sup>1</sup> Most of the American cases, in which there was a malicious interference with the relations of third parties, will, however, on close examination, be found to involve one of three elements: an existing contractual relation not terminable at will,<sup>2</sup> or falsehood and misrepresentation,<sup>3</sup> or combination and conspiracy.<sup>4</sup>

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<sup>1</sup> 28 Am. Law Rev. p. 47.

<sup>2</sup> *Haskins v. Royster*, 70 N. C. 601 (1874); *Jones v. Stanly*, 76 N. C. 355 (1877); and *Salter v. Howard*, 43 Ga. 601 (1871).

<sup>3</sup> *Benton v. Pratt*, 2 Wend. 385 (1829); *Rice v. Manley*, 66 N. Y. 82 (1876); and *Lally v. Cantwell*, 30 Mo. App. 524 (1888).

<sup>4</sup> *Dickson v. Dickson*, 33 La. Ann. 1261 (1881); *Baughman v. Typographical Union*, 35 Alb. Law Jour. 226 (1887); *Lucke v. Clothing Cutters' & Trimmers' Assembly* (Md.), 26 Atl. Rep. 505 (1893); *Vegelahn v. Guntner*, 167 Mass. 92 (1896); and *Curran v. Galen*, 152 N. Y. 33 (1897).



As to acts of interference involving one of these three elements, the law appears to be fairly well settled, although the dissenting opinions in *Vegelahn v. Guntner* show that some phases of conspiracy still present considerable difficulties, and although in Kentucky the procurement of a breach of contract appears to be regarded as actionable only where the contract is one of employment.<sup>1</sup> Still in all these cases there is something in addition to malice which makes the tortious character of the act more intelligible or more easily acceptable.

The precise question whether it is unlawful for one person maliciously to induce another to terminate a relation which can be terminated without breach of contract, where damage results from the act, has been presented in America in the cases cited in the note.<sup>2</sup> The Maine and Vermont cases were decided in favor of the defendant on the ground that he acted on his own land, so that the malicious interference appeared as an act of exercise of ownership, the exercise of property rights being regarded as forbidding any inquiry into motives, and being, therefore, a sufficient defence to the charge of malice.<sup>3</sup> As to the Massachusetts case, it is true that one of the causes of action was interference with a contractual relation, and the dissenting opinion of Field, C. J., in *Vegelahn v. Guntner* appears to regard the case as decided upon that point; but the declaration also charged that defendant induced persons who were about to enter the employment of plaintiff to leave and abandon it, and the opinion discusses at great length the question whether malicious interference apart from existing contracts is actionable, and concludes that it is. The Florida case follows the Massachusetts decision. The California court, on the other hand, in a carefully reasoned opinion, arrives at the opposite conclusion. Under these circumstances it can hardly be said that the question at issue in *Allen v. Flood* is no longer open for discussion in this country.

When we consider the theory of the various cases dealing with malicious injury, we should eliminate all those in which there was misrepresentation. Liability for false statements made, with intent

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<sup>1</sup> *Chambers v. Baldwin*, 15 S. W. Rep. 57 (1891).

<sup>2</sup> *Walker v. Cronin*, 107 Mass. 555 (1871); *Chipley v. Atkinson*, 23 Fla. 206 (1887); *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233 (1893); *Haywood v. Tillson*, 75 Me. 225 (1883); and *Raycroft v. Tayntor*, 68 Vt. 219 (1896).

<sup>3</sup> *Phelps v. Nowlen*, 72 N. Y. 39 (1878); *Letts v. Kessler* (Ohio), 42 N. E. Rep. 765 (1896).

to injure rests upon the same principles as ordinary fraud, since it can make no difference whether a false statement is made directly to the party injured, or to some third party, with the view that the act of the third party induced thereby should inflict the injury. We should eliminate all cases of violence or threats of violence, since they clearly affect the security of the person, an elementary right. We should also eliminate all cases of oppression, upon principles above explained. Not every technical conspiracy, however, amounts to oppression, or presents the features which radically alter the nature of the individual act, and there is no reason why a malicious act by two or three should be treated differently from a malicious act done by one.

Confining ourselves, then, to cases of which *Walker v. Cronin* and *Boyson v. Thorn* in America, and *Allen v. Flood* in England, are types,—cases in which one party intentionally, and, as the expression is, maliciously, inflicts injury upon another without violating one of the elementary personal rights otherwise recognized in the law of torts,—we should distinguish two questions: Should a cause of action be recognized? and: If a cause of action is recognized, how shall we define the tort, how shall we make the right violated clearly intelligible? The first question is one of legal policy; the second, one of legal doctrine; but it is partly on the ground that the doctrine is unintelligible that the cause of action has been repudiated, and the courts generally treat the two questions as one.

If an act otherwise lawful becomes unlawful because done with malice, it is necessary to recognize the existence of a right of security against malice. This right would be an extension of the sphere of what might be called social security, which is already protected by causes of action for fraud, negligence, libel and slander, and conspiracy. There would be no inherent logical objection to the recognition of such a right, provided malice were properly defined. It will not do to say, "The court will not define malice any more than it will define fraud. All plain men know what is meant by saying that a man has acted maliciously." The great objection to the present state of the law is that the term "malice" is used in a loose and vague sense, being confused with fraud, misrepresentation, and oppression. To say that malice is an unlawful purpose to cause damage and loss, without right or justifiable cause, is to tell us nothing that is specific of malice, for these elements belong to every intentional tort, and it is desirable

to define malice as a tort *sui generis*. As such malice ought to mean in law what it means in fact, the intentional infliction of damage through personal ill-will or spite, for purposes of revenge, or for illegitimate and corrupt personal ends. It is, however, clear from the decided cases that there is no absolute or perfect right to be protected against malice in this sense. It is not unlawful to use one's property to the injury of a neighbor, however malicious the use, and however clear the malice. The same is true of the exercise of any other specific right resting upon a special act of acquisition, like a right under a contract, the right of a judgment creditor, etc. If it is true that malicious injury is an actionable wrong, we must recognize the existence of the following qualification: an act by which a property right or a right resting upon special relations with others is exercised, is never deemed to be malicious. Notwithstanding a few *dicta* to the contrary, this is the established law in this country and in England.

And, furthermore, where the courts have recognized malice as a cause of action, the facts frequently fail to show the existence of malice in the true and proper sense of the term. This is especially true of the cases in which the problem of malice is most frequently discussed, those involving relations between employers and employed. Where the act complained of is done in the honest and sincere conviction that injury to another person is a necessary means to accomplish some legitimate end, that recognized social or economic interests can be accomplished only by the systematic suppression of resisting forces, — there, it seems to me, the element of malice is conspicuously absent, although there may be a clear case of conspiracy. Such cases should be judged as cases of oppression and not as cases of malice.

If, in a case like *Allen v. Flood*, we abandon the theory of malice, there remains nothing but the right to pursue one's trade or occupation as a basis for discussion. Even this, it seems to me, can be made sufficiently intelligible to be recognized as a legal right. The Lord Chancellor quotes with approval the following definition of this right from Sir William Erle's treatise on the law relating to trade-unions: "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible



with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."

This statement is unsatisfactory in so far as it fails to define with sufficient clearness when obstruction is lawful, and in so far as it intimates that the right is limited only by similar rights of others. Moreover, if the right is to be recognized, it should not be confined to the disposal of labor or capital.

The right would consist in the liberty to enter social as well as economic relations. It cannot, of course, be a right as against the persons with whom relations are sought, for liberty on the one side demands liberty on the other. It is a right, therefore, only against third parties; *i. e.*, a right of security against interference. It is a larger right than the right of security against malice, for to establish its violation it is not necessary to show that the interference proceeded from a specific motive, but it is sufficient to show that it is without justification. This is recognized by the cases which lay all stress upon the absence of lawful cause or excuse — which, however, ought not to be called malice.

In order to determine the extent of the right it is necessary to define the grounds of justification of interference. Two such grounds appear to be clearly recognized by the cases: First, by analogy to the law relating to malice, the exercise of some specific right of ownership or contract, or a right resting upon some other distinct title; second, upon the authority of the *Mogul Steamship Company* case, the exercise of a similar right by the interfering party, which constitutes competition. It seems, however, that another ground of justification should be recognized in order to place the law upon a reasonable basis. If every act of interference with the civil liberty of another, not grounded upon a superior right of property or contract, or upon the equal right of competition, were actionable, the freedom of social relations would be destroyed by over-protection. It cannot be that every act of warning which may result in injury to the party warned, or to a third party, is a legal wrong. If a right of security against interference is to be recognized, a large

and liberal exception by way of justification should be allowed under the plea of privilege.

This privilege would be similar in nature and operation to the qualified or relative privilege which, in the absence of malice, justifies a libellous communication, and would have about the same scope. As in the case of libel, it would excuse acts done in the performance of a moral or social duty, and acts of persuasion or warning based on relations of friendship or association or business. The two cases of privilege — in addition to the other grounds of justification — would probably cover all legitimate acts of interference. It is certain that if the right were once recognized, not every act of interference would be excused simply because it was honestly believed a proper means of furthering a selfish interest. In the course of argument in *Allen v. Flood* one of the judges asked whether, if a butler, on account of a quarrel with the cook, told his master that he would quit his service if the cook remained in it, and the master, preferring to keep the butler, terminated his contract with the cook, the latter could maintain an action against the butler. Another judge answered this question without hesitation in the affirmative. In such a case, however, it seems that the warning might have been justified as the exercise of a special right, viz., the right to terminate a relation to which one is a party. Had the House of Lords recognized a right of security against interference, the question would have been: Was Allen's act covered by privilege? The Lord Chancellor clearly states that in his opinion it was not. "In my view his belief that what he was doing was for his interest as a delegate of his union would not justify the doing of what he did do." It should be said that in the usual cases between employers and employees this question would rarely require an answer, since they are generally covered by the rule against oppressive combination which recognizes no privilege. Evidently the successful establishment of a right against interference would depend upon a satisfactory definition of the privilege which excuses interference; and while this privilege can hardly be compressed into a formula, it would be rash to say that the courts could not succeed gradually in laying down its limitations with sufficient certainty for practical purposes.

On the whole, there seems to be no greater difficulty in defining a right of security against malice or against interference than in defining a right of security against negligence, and the difficulty is probably less. So far, however, the courts which propose to pro-

tect these rights have not undertaken to define them, and this has been given by the House of Lords as a reason why their recognition should be refused. To leave the whole question as one of malice simply to the jury, is certainly a most unsatisfactory solution of the problem.

Much graver objections might be urged against these rights upon the ground of legal policy. Should the law undertake to regulate the conflict of interests otherwise than by forbidding violence, fraud, and perhaps the oppressive use of the power of association? Should it secure a right to fair play? It may be admitted that the development of social sentiment demands a constantly rising standard of conduct in the pursuit of conflicting interests, without concluding that the law needs to follow *pari passu* with its remedies, which at present are certainly not adequate to work out a perfect realization or protection of rights of great delicacy. It is, however, also true that social sentiment to-day is very apt to seek and find expression in the law, and argument counts for very little in the face of such a tendency. Even in England it is almost certain that the decision in *Allen v. Flood* does not conclude the development of this phase of the law. If legal rights are to be extended in the direction suggested by this case, it will be incumbent upon the courts to distinguish malice from oppressive conspiracy, to define the meaning of malice, and to determine whether and to what extent, in the absence of malice, a right of security against interference should be recognized.

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RESPONSIBILITY OF NATIONAL BANK DIRECTORS. — The duties of a director of a national bank, and the degree of watchfulness over the details of the business required of him by law, were passed upon by the United States Supreme Court in the case of *Briggs v. Spaulding*, 141 U. S. 132. It was there laid down that a director is not bound to make an actual examination of the accounts of the bank, and that he is not liable to the corporation for losses which he could have averted only by making such an examination. The contrary doctrine prevails in some States; and even in the federal courts considerable dissatisfaction with this view of the Supreme Court has been expressed. The rule of *Briggs v. Spaulding*, *supra*, was followed, in the recent case of *Warner v. Penoyer*, 82 Fed. Rep. 181, but with evident bad grace. From the standpoint of the business man, however, the rule must be considered salutary. Unfortunate results come from looking upon a bank director as a trustee for the bank, or for its creditors. Analysis of this position discloses difficulties both technical and practical; for if there is a trust it is technically hard to find any trust *res*; and in practice it is impossible to demand of a director the time and care which are demanded of a trustee. The duty owed by the director to the corporation, according to the better view, is a legal one, the duty of care under all the circumstances of his office; and comparison of this legal duty with the equitable duty of a trustee seems vain except as a means of emphasizing the difference.

Applying the common-law test, one can hardly escape the conclusion that the average man would not feel it incumbent upon him as director of a bank to inspect the discount register and the general ledger. Matters concerning the policy of the bank, the loans contracted, and the collateral received, call for his general supervision; but in fulfilling this duty he is ordinarily entitled to rely upon the statements made by the officers of the bank, without verifying them in detail in the accounts.

The practice of business is to be considered, not as conclusive, but as evidence of what is reasonable; and business practice demands no such personal examination. Merely to compare cash balances with book balances and to examine collateral securities would take a director more time than can in fairness be asked; and if in addition he were required to make a study of the receivable paper and the specific entries in the ledger no business man would accept the office. In supporting the rule of *Briggs v. Spaulding, supra*, it must be remembered, moreover, that the rule is not dogmatic; it requires a consideration of all the circumstances of each case; and when circumstances give rise to suspicion it would hold a director culpable in not setting on foot an investigation. Only so long as he acts in good faith can he be protected from liability.

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DECLARATIONS OF PHYSICAL CONDITION. — Perhaps no branch of the law of evidence has had such an important development in recent years as the exception to the rule against hearsay in respect to declarations by a person as to his mental or physical condition. This exception, like all exceptions to hearsay, is based on historical grounds rather than on any broad principles of reasoning, and unfortunately its development in our different States has not been uniform. In a recent case in the New Jersey Court of Appeals it was stated that the declarations by the plaintiff of his symptoms made to a physician in order that the latter might give his opinion as witness for the plaintiff, are not admissible. The action for injuries by the plaintiff had already been commenced. *Lambertson v. Consolidated Co.*, 38 Atl. Rep. 683. The court says that statements made to a physician for the purpose of treatment derive "credibility beyond hearsay" because of the strong incentive of a patient to speak truthfully to one about to administer remedies to him. But when the physician is merely to give his opinion for the patient, all incentive to truthfulness is gone, and, instead, "self-interest becomes a motive for distortion, exaggeration, and falsehood."

The Court seems to assume that declarations of symptoms are admissible only when made to a physician for the purpose of treatment; a view which, it must be admitted, has grown up in several States, (see, for example, *Grand Rapids R. R. v. Huntley*, 38 Mich. 537.) The better rule, however, seems to be that declarations of physical or mental condition made to any one are admissible as evidence of such condition. (Greenleaf, 15th ed., § 102.) As to the objection that the declarations were *post litem motam*, that rule, as a rule of exclusion, seems to have been uniformly applied only to declarations as to matters of pedigree or of public and general interest. That the statements, then, in the present case were made for the purpose of enabling the physician to testify for the declarant, and that an action had already been commenced by the latter, would appear rather to detract from the weight of such evidence than to exclude it altogether. The motive for fraud or falsehood in making the declarations would vary according to the circumstances of each case, and the jury, under proper instructions, would judge of the credibility of the evidence.

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A LIBERAL CONSTRUCTION OF A MECHANIC'S LIEN LAW.—The object of the Mechanic's Lien Law is "to make the pay of those whose labor has gone to enhance the value of the erection, prompt and secure in all



cases against both the misfortunes and the possible dishonesty of their employers; and the construction to be adopted is that which, without violating the true signification of the language employed, shall best promote the object and efficiency of the statute." Barrows, J., in *Collins Granite Co. v. Devereux*, 72 Me. 422. A recent illustration of liberal construction under such laws is the decision of the Supreme Court of the United States in *Springer Land Association v. Ford*, 18 Sup. Ct. Rep. 170. The question in this case was as to the extent of land subject to a lien for labor performed on a ditch. The statute gave a lien for labor performed on improvements on land, including ditches, and provided in general that "the land on which any improvement is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation of the same, — to be determined by the court, — is also subject." This was construed to give a lien not only on the ditch itself, but also on the tract of twenty-two thousand acres which the ditch was intended to irrigate. Chief Justice Fuller, for the court, says, in substance, that to limit the lien to the strip sixty feet in width and twenty-six miles long, which was actually occupied by the ditch, "would unreasonably circumscribe the meaning of the statute." The ditch could not be operated without the tract it was intended to water. "Each was dependent on the other, and both were bound together in the accomplishment of a common purpose."

Mechanics' lien laws are interpreted either strictly, as granting one class of citizens special privileges in derogation of the common law, or liberally, as fostering the improvement of the country by justly aiding the laborer. Courts generally shape their views according as the statute in question is equitable or not. If the statute proposes to charge the property of one man for the debts of another, it will be strictly construed; but if it gives no more than a fair security to the laborer out of the property of the employer, it will be interpreted liberally. The statute in this case seems just; and the court were doubtless correct in construing it liberally. Whether even by liberal construction the twenty-two thousand acres were "required for the convenient use" of the ditch, within the meaning of the legislature, is not as clear. Control of the ditch would give practical control over the lands, and would seem in itself ample security for the labor expended. It might be argued, moreover, that the words of the statute apply rather to the space necessary for conducting the water properly, for repairing the banks, and so forth, than to the land whose proprietors, by withholding their patronage, might make the operation of the ditch unprofitable. Still the decision from a moral standpoint is not unjust. Other jurisdictions have gone even further; and considering the present tendency of legislation to give the mechanic every encouragement, the result here reached is probably justifiable.

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SHIPMENTS C. O. D. *versus* THE LIQUOR LAW. — A man in a place where the sale of intoxicants is prohibited orders liquor from a licensed dealer in an adjoining county to be sent C. O. D. On its arrival he pays the carrier the price and express charges, and is given possession. Has there been an offence under the liquor laws?

This question recently came before the Kentucky Court of Appeals, *Fames v. Commonwealth*, 42 S. W. Rep. 1107; and it was ruled that the transfer of title took place when the goods were given to the express



company, and accordingly that the statute had not been violated. The question has been considerably discussed in other States, with some conflict of opinion, but the rule above stated seems to be correct. Courts taking the opposite view contend that the carrier is the agent of the seller, and that payment of the price is a condition precedent to the transfer of title. They receive apparent support from the many cases which have held that when a vendor takes a bill of lading from the carrier to his own order he retains title, though the goods are consigned to, and at the risk of, the buyer. This support, however, is apparent only, as in most of these cases the right of possession was the only point in dispute, and the remarks about title were uncalled for. Repetition has so established these *dicta* that they will now probably be followed as law; they appear, nevertheless, to be founded on mistake, and should govern only in cases where bills of lading are taken.

Title depends ultimately on the intention of the parties. Shipment at the buyer's risk throws on him all the burdens of ownership. If he pays the freight, the carrier must be considered his agent rather than the agent of the vendor. Accordingly, when these facts appear, title will be presumed to pass at the time of shipment by mutual assent. When additional facts appear, the inquiry should be how far they tend to support or rebut this inference. Now it seems plain that adding the words "cash on delivery" does not necessarily show more than a desire to control the possession, which desire is entirely consistent with an intention to pass title. And finally, when we consider that, in nine cases out of ten, the shipper will know the liquor laws in question, it seems unreasonable to say that he exposes himself to a criminal prosecution for the sake of retaining title when he can keep every advantage by a simple lien.

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THE MAYOR OF BOSTON ENJOINED. — The injunction issued Jan. 25, 1898, by Judge Richardson, of the Superior Court of Massachusetts, against the mayor of the city of Boston and others, has the distinction of involving at once questions of importance from the three standpoints of politics, law, and equity. *Lynch & Woodward v. Josiah Quincy et al.*, Boston Advertiser, Jan. 26, 1898. The plaintiffs were under contract with the city to make repairs upon the Dover Street bath-houses. Failing to carry out a bare promise on their part to employ only union men, a promise which was distinct from the contract, and not enforceable at law, they were ordered, by the authority of the mayor, at the request of the labor unions, to stop work. Police were sent to enforce this order; whereupon the plaintiffs applied for an injunction. A temporary injunction was accordingly granted, by Judge Richardson, which restrained the mayor and the other defendants from further interference.

Commendable or ill-advised as the action of Mayor Quincy may have been, judged by the standards of ethics or politics, that inquiry is beyond the province of the law. Whether the act restrained, however, was a tort, and, if a tort, whether equity had jurisdiction to restrain it, are living questions. The first point the law must answer by saying that Mayor Quincy's act was a legal wrong. The court seems to have been right in holding that his interference was outside the scope of his authority, and not binding upon the city. His act, therefore, is to be looked upon as done in his personal capacity, with the intention of preventing the plaintiffs from completing their contract. Such a prevention is a tort. The

usual form of this wrong, it is true, shown by the cases which follow *Lumley v. Gye*, 2 E. & B. 216, is the prevention of a third person from carrying out the contract obligation to the plaintiff; but upon principle the injury to his plaintiff's contract is the same if he is himself prevented from carrying out his own obligation to the third person. The authority, also, of the United States Supreme Court sanctions the conclusion that the mayor's act was a tort for which he would be liable in damages. *Angle v. Chicago, St. P., M., & O. Ry. Co.*, 151 U. S. 1.

The further question whether equity properly had control over this case gains little light from the authorities. Equity jurisdiction in America has been somewhat abused in cases of strikes and interference with business,—cases which should not be followed blindly. The present case, however, differs from them. See *Thomas v. Cin., N. O., & T. P. R. R. Co.*, 62 Fed. Rep. 803. The right infringed when business, so called, is interfered with is generally the personal right to transact business freely, and in behalf of a personal right equity is slow to interfere. The right to the contract, on the other hand, which is here violated, is a right of property, incorporeal, to be sure, but yet clearly distinguishable from a more personal right. Equity will not look complacently upon its destruction, or refuse to give negative relief when circumstances show the inadequacy of the remedy at law. Serious difficulty in the present case would be found on assessing the damages at law; this fact alone is a ground on which equity may step in. A current of authority also allows more than ordinary latitude in granting injunctions against persons having public authority who abuse the powers delegated to them. A more fundamental reason, however, for equity jurisdiction may be suggested,—a reason nowhere clearly stated, but indistinctly pointed out as the path for the future development of equity. By preventing the plaintiff from completing his contract the mayor would virtually substitute a claim against himself for the claim which the plaintiffs would have against the city on completing the contract; it seems unjust that a doubtful claim against an individual should be held equivalent to the contract claim against the solvent city corporation. For this reason the remedy at law would be inadequate. The credit of the parties, perhaps, may be hard to compare; but equity should be justified in holding that no such tortfeasor can say that the claim against him which arises out of his tort is equivalent to the claim under the contract which he has destroyed.

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BEQUESTS TO A CORPORATION.—The reasons of public policy which induce legislatures to restrict the amount of property which charitable corporations are authorized to hold are not very clear; and the slight importance which the law-makers attach to such restrictions is shown by the readiness with which they usually remove them as soon as a gift is made to such a corporation which would increase the property beyond the limit set. Where the courts, however, hold that such restrictions render a gift entirely void, so that the heirs or next of kin have the same rights as if it had never been made, the action of the legislature comes too late to aid the corporation. In the case of *Farrington v. Putnam*, 37 Atl. Rep. 652, the Supreme Court of Maine were very evidently animated by a desire to help a worthy charity out of the predicament which would follow from such a view of the nature of the restrictions on its authority to hold property. The indulgence of this desire, however, is most ably



justified by Chief Justice Peters in his long and learned opinion. What makes this case especially interesting is that the gift was of personalty, so that the decision is, on its face, directly contrary to that in *Re McGraw's Estate*, 111 N. Y. 66, the most important previous case on bequests of personalty. The court does not directly disapprove that case, taking it to rest on a strict construction of certain New York statutes, but its reasoning all goes in the contrary direction.

The want of clearness in all the cases on this subject results, perhaps, from a failure to perceive that in establishing its rule on this subject any court can, with some justification in principle, draw the line against gifts to corporations, in excess of the amount they are authorized to hold, at any one of three places, or not at all. It can draw it so as to exclude such gifts in all cases; or between gifts *inter vivos* and gift by will; or between devises of land and bequests of personalty. Or it can hold all such gifts valid, always leaving to the State, of course, its right to punish the corporation by direct proceedings for its violation of its charter. Consistently to treat all gifts in excess of the limit as void would probably seem too severe a policy to any court. The possibility of a distinction between gifts *inter vivos* and testamentary gifts was pointed out in 9 HARVARD LAW REVIEW, 350. Still stronger technical grounds would seem to exist for making a distinction between devises and bequests. No practical reason, on the other hand, can easily be found for drawing the line at any particular place. In this branch, at least, of the subject of *ultra vires* transactions by corporations, the doctrine that only the State can take advantage of the lack of authority in the corporation seems very attractive.

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A MARITIME CONTRACT OF CARRIAGE. — It was formerly the opinion of several American jurists, including Mr. Justice Betts, an acknowledged authority on maritime law, that when a contract of carriage by sea has been entered into, not only the owner, but the vessel herself, is at once bound, without more, to the performance of the contract; or, in other words, that a right *in rem* immediately arises. A *dictum*, however, of the Supreme Court of the United States in *The Freeman v. Buckingham*, 18 How. 182, seems to have changed the trend of decisions, and it is unquestionably the prevailing doctrine at the present day that a court of admiralty has no jurisdiction *in rem* for the breach of a purely executory contract.

The recent case of *The Eugene*, 83 Fed. 222, is in accordance with this modern doctrine. Usually the question has arisen in connection with a contract of affreightment, and this late decision is interesting as showing that the principle is equally applicable to a contract of passenger carriage. In this case it appears that the owner of the steamer "Eugene" contracted to carry the libellants, with their baggage, on board that particular vessel, from St. Michaels to Dawson City. The libellants alleged a breach of this contract on the part of the vessel in that she never went to St. Michaels to receive them. The court held that a suit *in rem* was not maintainable for a breach of this executory contract, inasmuch as the lien, upon which the right to proceed *in rem* depends, does not attach until the passenger has placed himself within the care and under the control of the ship's master.

It would seem to be the correct view that no lien upon the vessel arises merely from the fact that her owner has entered into a contract of car-



riage. The basis of a maritime lien is to be found in marine service by or to the vessel herself, often irrespective of the contracts of her owner. Where, therefore, the parties have made a contract of carriage, there remains the further question as to what must be done in performance of the contract in order to entitle the passenger or the shipper to a lien upon the vessel herself. Many of the cases, including *The Eugene*, seem to proceed upon the theory that the obligation between the vessel and the cargo or passenger being mutual and reciprocal the lien attaches as soon as the cargo or the passenger is on board the ship, or at least under the control of the master. It is conceived, however, that in strictness no lien upon the vessel comes into existence until she sets sail. Before the voyage actually begins, the passenger or shipper has adequate remedy against the carrier in the courts of common law, or by a proceeding *in personam* in the courts of admiralty; and until that time the vessel herself can hardly be considered at fault. But as soon as the vessel leaves her dock, she enters upon marine service, and from that moment the vessel and the cargo or passenger may truly be regarded as mutually and reciprocally bound. This view is certainly supported by the analogous cases which hold that the carrier has no lien upon the goods until the ship starts upon her voyage.

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THE MAKER'S DEFENCE OF "NEVER CONTRACTED." — A late English case, decided by Lord Chief Justice Russell, clearly illustrates an important distinction in the law of negotiable paper. In this case, *Lewis v. Clay* (reported in 42 Solicitors' Journal, 151), which was an action by the payee of a note against one of two co-makers, the defendant pleaded that he never made the note. It seems that the defendant signed the instrument without reading it, relying upon the fraudulent statement of his friend, the other co-maker, that he was simply witnessing a deed. The jury found that the defendant had not been negligent, and that the plaintiff took the note from the fraudulent co-maker for value and without notice. It was held that the defendant, having used due care, was not estopped from setting up the true facts; and that, according to these facts, the defendant had never made the note in question.

Unquestionably the true nature of the obligation assumed by the maker of a note is that of contract to pay the payee or the holder in due course. One of the essential characteristics of contract, however, is mental assent, and in such a case as *Lewis v. Clay*, *supra*, where the defendant thought he was signing an entirely different instrument, it is certainly difficult to find this feature. As tersely put by Mr. Justice Byles, in *Foster v. Mackinnon*, L. R. 4 C. P. 704, a similar case, "he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended." Though, in Lord Russell's view, the plaintiff in *Lewis v. Clay*, being the named payee, was not a holder in due course, it has been the law ever since the decision in *Foster v. Mackinnon* that, in the absence of negligence, the plea that there has not only been fraud, but that the defendant has never entered into the contract, is equally available against such a holder. Where, however, the defendant has acted without due care, as by not reading the paper when he should have read it, it is properly held that he is estopped as against a purchaser for value without notice from denying the execution of the instrument; and, according to *Lewis v. Clay*, the

negligent defendant may also be estopped as against the named payee who has purchased innocently.

There is clearly a sharp distinction between such cases as *Foster v. Mackinnon* and *Lewis v. Clay*, and the cases where the defendant has really intended to enter into the contractual obligation represented by the negotiable instrument upon which he has placed his name. In the latter cases, the defendant has actually made the note in question, and, though he has been induced to sign his name by fraud or duress, he is nevertheless liable to a purchaser for value without notice.

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THE PAYEE AS A HOLDER IN DUE COURSE. — The case of *Lewis v. Clay* discussed in the preceding note, is also of interest because of Lord Russell's *dictum* that the plaintiff as named payee was an immediate party, and could not, therefore, be regarded as a holder in due course, though he paid value and took without notice.

Lord Russell, in support of this view, relies chiefly upon the Bills of Exchange Act. It would seem, however, that by a proper interpretation of that statute, such a payee as the plaintiff in the case under consideration should be regarded as much a holder in due course as a subsequent transferee; and, apart from the statute, Lord Russell's position is clearly inconsistent with the overwhelming weight of authority both in England and the United States. See, among other cases, *Masters v. Ibberson*, 8 C. B. 100; *Watson v. Russell*, 31 L. J. Q. B. 304; *Fairbanks v. Snow*, 145 Mass. 153; *Lucas v. Owens*, 113 Ind. 521, and cases cited. Apparently the courts of only one jurisdiction hold the contrary opinion. See *Camp v. Sturdevant*, 16 Neb. 693. Moreover, it is conceived that on strict legal principle the *dictum* cannot be supported. The payee, in such a case as *Lewis v. Clay*, purchases the legal title to an instrument, complete and regular on its face, for a valuable consideration and without notice of fraud, duress, or lack of consideration. Under such circumstances, to subject the plaintiff to all the defences that might be raised against an immediate party privy to the whole transaction, would not only work injustice, but would be contrary to well-established principles of law as to the nature of purchase for value without notice.

The provisions of the English Bills of Exchange Act in regard to a holder in due course have been incorporated into the Negotiable Instruments Law, which has been already enacted in several of our States, and American lawyers, therefore, will be especially interested in watching the influence of Lord Russell's position upon future decisions. It is not believed that either the English or the American courts will change their present opinion.

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RECAPTION OF A RAILROAD SEAT. — An interesting and unique case in railroad law was recently decided in one of the English lower courts (see *Albany Law Journal*, Jan. 8, 1898). A gentleman travelling in a train temporarily left his carriage at one of the stations, and took the usual precaution to reserve his seat by leaving therein his umbrella and newspapers. While absent, another passenger seized his seat, and refused to give it up until forcibly ejected by the former occupant. The ejected passenger brought an action for damages against the original holder of the seat. The action was dismissed, and a counter-claim for similar damages sustained. The court said that this universal mode of



reserving a seat was justifiable and convenient, and that reasonable force may be used to eject an intruder. It has not been possible to obtain a full report of the case, so that the legal grounds upon which the court proceeded must remain a matter of conjecture. Certainly it is difficult to find any interest or property in the holder of a seat upon which to base his right of recaption. It may be suggested, however, that a passenger in a train has been given the custody of his seat by the railroad company. He is entitled by his contract of carriage to some seat, and although the company could compel him to change it, still, as against all others, the law should permit him to maintain the custody of a seat he has rightfully taken, and to eject any one that usurps it. The servant to whom a master intrusts a horse, has not possession of it, yet surely he could lawfully recapture the horse from a thief. A lodger cannot be said to have possession of the meal placed before him, yet who would deny him the right to retake from his grasping neighbor his knife and fork, or his turkey? And even assuming that the holder of a reserved seat in a theatre has no right of property, who can doubt that he would have a right to eject an intruder? There is little or no decided authority for such a view, but it is submitted that the case is an example of a right so universally recognized by the good sense of the public, that it has not hitherto come up in a court of law.

The decision that reasonable force may be used in retaking the seat appears, perhaps, inexpedient as tending to produce breaches of the peace (see *N. Y. L. J.*, Jan. 19, 1898); yet in ordinary cases of recaption the law permits the use of reasonable force, short of wounding or the use of dangerous weapons, in regaining momentarily interrupted possession. *Commonwealth v. Donahue*, 148 Mass. 529.

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GREAT ENGLISH JUDGES. — COMMON PLEAS. — This last of a series of notes the object of which has been to individualize, in the slight degree that is possible in such narrow limits, certain names familiar to those acquainted with the English Reports, does not find in the Court of Common Pleas so rich a field for selection as in the Chancellorship, the King's Bench, or the Exchequer. Coke, and Sir Matthew Hale, to be sure, sat in the Common Pleas, but during a more modern period this court has fewer great names in the list of its judges than the others.

From 1829 to 1846 the Chief Justice of the Common Pleas was Sir Nicolas Conyngham Tindal. He was born at Chelmsford in 1776; educated at Trinity College, Cambridge, where, after a highly creditable career, he was made a fellow of his college; studied law at Lincoln's Inn, and first took up the practice of special pleading. In this branch of law he became very proficient, and attracted so considerable a business that in 1809 he was able to be called to the bar, and to give up his fellowship by marrying. At the bar he soon had plenty of employment. Many pupils, too, resorted to his chambers, among them two young men who later became known in the legal world as Lord Brougham, and Baron Parke. As a lawyer Tindal was distinguished rather for the logical skill with which he argued, due no doubt to his study of special pleading, than for any natural eloquence or rhetorical force. Perhaps the two most interesting events of his career at the bar were his share in the defence of Queen Caroline, and his conduct of the appellee's case in *Ashford v. Thornton*, 1 Barn. & Ald. 405. In that case, which was an appeal of



murder, Tindal in behalf of his client demanded wager of battle, and convinced the court that as the law stood they had no option but to support the appellee's refusal to put himself on the country. By this ingenious use of the old law Tindal saved his client; for when Thornton was indicted by the Crown he was able to plead *autrefois acquit*, and was immediately dismissed. In 1829 Tindal was made Chief Justice of the Common Pleas, having been Solicitor-General, and for several years a member of Parliament. During the seventeen years he presided over this court he was remarkable for his urbane and dignified manners, his invariable good temper, and his sound exposition of the law. As a judge he was almost universally looked up to and respected. Socially he seems to have inspired those who knew him with a strong and respectful regard. His usually grave demeanor made familiarity impossible, but his courtesy and amiable disposition engaged people's affections. He died in 1846.

Sir William Henry Maule was a judge of the Court of Common Pleas from 1839 to 1855. He was educated at Trinity College, Cambridge, and was senior wrangler in the mathematical tripos and fellow of the college. His favorite study was mathematics, in which he was singularly proficient, being offered a professorship in that science at Haileybury College, which he refused. In 1814 he was called to the bar, where his advancement, though not rapid, was steady and sure. He had a great reputation as a commercial lawyer, being an acknowledged authority on questions of maritime insurance. He was king's counsel, counsel to the Bank of England, and a Liberal member of Parliament. In 1839 he was made baron of the Exchequer and knighted, and the same year was transferred to the Common Pleas. He resigned from that court in 1855, but was shortly after sworn of the Privy Council, and served on the Judicial Committee till his death in 1858. Maule was one of the best judges of the Common Pleas. His thorough knowledge of law was reinforced by sound common sense, and his ingenuity for defeating technicalities was happily a marked characteristic. His judgments are excellent examples of proper judicial opinions,—clear, pithy, and enriched with well-chosen illustrations. Both at the bar and on the bench Maule was famous for his ironical humor. This habit of mind it is said sometimes led to unlooked-for results at Nisi Prius trials of criminals. After the judge's summing up, the jury in their deliberations frequently mistook the ironical language they had listened to as the serious opinion of the court, and returned a verdict precisely opposite to what was looked for and desired. Socially Maule was distinguished for refined pleasantry and cordiality of friendship.

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A MAXIM MISUSED.—Fallacy shields itself behind many a Latin maxim. "*Ignorantia juris non excusat*;" this maxim has done its share in confusing the law of quasi-contracts. Its original meaning was that one person cannot excuse wrong done to another by showing that he acted in ignorance of the law. As misapplied in *Bilbie v. Lumley*, 2 East, 469, the words have had the additional meaning attributed to them that a plaintiff who brings action to recover money paid under mistake of law cannot recover. Founded on a misconception, this doctrine has dominated English law, and is to-day received in most American States. When an illegal tax has been paid under belief that it is legal, and the payer demands repayment of his money, the courts, as in the recent case of *Pomeroy v. Board of Commissioners of Graham County*, 50 Pac. Rep. 1094

(Kans.), refuse relief almost without discussion. A few courts, however, have noticed the fallacy, and have properly declined to follow the English authorities. *Northrup v. Graves*, 19 Conn. 548. Ignorance of law, indeed, does not excuse; but one who has paid money under a mistake of law does not ask excuse, for he has done no wrong. In conscience he is as much entitled to recover his money as if his mistake had been one of fact, and the law should afford him the same redress.

## RECENT CASES.

**CONFLICT OF LAWS — FOREIGN CORPORATIONS — TAXATION.** — A statute provided that non-residents doing business in the State of New York should be taxed on all sums invested in that business, as if they were residents. *Held*, that the credits of a foreign corporation were thereby subjected to taxation. *People v. Barker*, 48 N. Y. Supp. 553.

The tax is laid not upon the right of the foreign corporation to do business in New York, but on its property. Property of a non-resident must be situated within the State in order that it may be taxed there. *People v. Comm'rs of Taxes*, 23 N. Y. 224. The situs of a debt is the domicile of the creditor, and it can be taxed there, *Kirtland v. Hotchkiss*, 100 U. S. 491; but not elsewhere, *State Tax on Foreign-held Bonds*, 15 Wall. 300. A person can have only one domicile at one time, *Abington v. No. Bridgewater*, 23 Pick. 170; and the State of incorporation is the domicile of the corporation. *Paul v. Virginia*, 8 Wall. 168, 181. Ingraham, J., dissenting in the principal case, follows this reasoning. The notion of the majority, that the credit is in New York merely because it appears on the books of the agency there, seems to be unsound.

**CONFLICT OF LAWS — TORTS — STATUTES.** — Kentucky and Tennessee have somewhat similar statutes as to recovery for causing death wrongfully. Plaintiff's decedent was killed in Tennessee by defendant's negligence. In that State contributory negligence is not a bar to an action, but merely goes in mitigation of damages. In a suit in Kentucky, where contributory negligence is a bar, *held*, that the law of Tennessee should govern defendant's liability. *Louisville & N. R. R. Co. v. Willow's Adm'r*, 43 S. W. Rep. 711 (Ky.).

Actions for common-law torts to the person or to personal property are generally held to be transitory in their nature, and may be brought wherever the wrongdoer may be found and jurisdiction of his person obtained. *Mitchell v. Harmony*, 13 How. 115. The English courts, however, refuse to enforce rights acquired by foreign law unless by English law the defendant would have been liable. *The Halley*, L. R. 2 P. C. 193. In this country the question usually arises in regard to actions for torts which are made actionable by statute in the place where they are committed. The earlier cases refused recovery on the ground that they would not enforce foreign penal laws, — a reason sound enough, but not applicable to the facts. The courts now generally hold that such rights will be enforced where there is a similar though not identical statute in the forum. *Dennick v. R. R. Co.*, 103 U. S. 11. Whether a similar statute in the forum is necessary is not everywhere agreed, but the true rule is believed to be as follows. Rights acquired in one State, whether in contract or tort (except certain classes of torts to reality), by statute or the common law, will be enforced everywhere unless contrary to public policy as interpreted in the forum. That the *lex fori* would not have considered the act a tort or the contract valid does not show it to be against public policy; it must be against good morals or natural justice. *Herrick v. Minneapolis, etc. R. R. Co.*, 31 Minn. 11.

**CONSTITUTIONAL LAW — EX POST FACTO STATUTE.** — A statute was passed after a crime was committed, which abrogated the previously existing rule that writings were not admissible for comparison with a disputed writing, unless they were in evidence and admitted to be in the handwriting of the party affected. *Held*, that it was not an *ex post facto* law. *State v. Thompson*, 42 S. W. Rep. 949 (Mo.).

Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender, is *ex post facto*. *Calder v. Bull*, 3 Dall. 386. This test has always been acceded to. *Kring v. Missouri*, 107 U. S. 221. But the principal case is



not open to this objection. The statute does not change the sort of evidence which may be introduced. It simply admits a larger class of writings than before. It is within the principle of *Hopt v. Utah*, 110 U. S. 574. In that case it was held that a statute passed after the commission of the crime, removing the disability of convicts to testify, was not *ex post facto*. It made no change in the kind of evidence which might be received, but simply enlarged the class of persons who might testify.

**CONTRACTS — CONDITIONS — SATISFACTION OF PROMISOR.** — Plaintiff sold certain machinery to defendant, payment to be conditional upon its operating to the latter's satisfaction. In an action by plaintiff for the purchase price, *held*, that, if defendant should have been satisfied, he is liable. He cannot reject the machinery arbitrarily, but must show reason for his dissatisfaction. *Hummel v. Stern*, 48 N. Y. Supp. 528.

The court merely follows previous New York decisions. *Dall v. Noble*, 116 N. Y. 230. The authorities generally are not unanimous on the point. The intention of the parties should furnish the governing principle. Therefore, if, by the natural interpretation of the agreement, payment appears to be dependent upon the actual satisfaction of the promisor, there seems little reason for stretching the fair meaning of the words in order to give a contrary decision. No rule of law or supposed public policy precludes the enforcement of such a condition so long as the promisor acts in good faith, and the doctrine of the principal case imposes upon the defendant a liability which neither party intended him to assume. *Singerly v. Thayer*, 108 Pa. 291. An earlier New York case is in accord with the above view, and with *Singerly v. Thayer*, *supra*, but the principal case represents the present law in that State. *Gray v. Central, etc. R. R. Co.*, 11 Hun, 70. The practical result is often the same, however, as the line separating an unreasonable rejection from fraud is often very indistinct.

**CONTRACTS — DIVISIBLE CONTRACTS — DAMAGES.** — The defendant railroad company contracted to furnish plaintiff with an annual pass, to be renewed at the pleasure of plaintiff. In an action for breach of the contract, *held*, that the contract is divisible, and plaintiff can only recover damages for breaches occurring before the commencement of the action. *Kansas & C. P. Ry. Co. v. Curry*, 51 Pac. Rep. 576 (Kan.).

The pass had been refused for five consecutive years. If, therefore, the contract had been bilateral, the breach would probably have gone to the essence, and would have excused plaintiff from performance of his part. This seems to be the test even in unilateral contracts like the present, in determining whether the plaintiff may treat the agreement as at an end and recover prospective damages. The decisions upon contracts for support or for employment have generally followed this principle, and it is difficult to distinguish the principal case from these. 2 Sedg. Dam., 8th ed., 126; *Parker v. Russell*, 133 Mass. 74. Whether there has been such a total breach is a question of fact. *Remlee v. Hall*, Vt. 582. The adoption of the above doctrine does not necessarily preclude the plaintiff from treating the contract as still in existence, and electing to recover merely for damage which he has suffered before the commencement of the action.

**CONTRACTS — STATUTE OF LIMITATIONS — WAIVER.** — *Held*, where a creditor was induced to forbear to sue on the faith of a parol promise by the debtor not to plead the Statute of Limitations, the latter defence will not be sustained, even though the Code provides that only a written acknowledgment shall be sufficient to take a debt out of the Statute. *Cecil v. Henderson*, 28 S. E. Rep. 481 (N. C.).

This decision is in accordance with the settled law of North Carolina. *Barcroft v. Roberts*, 91 N. C. 368. In England, it seems that a mere promise not to plead the Statute, even if the creditor forbears to sue in reliance thereon, is not a sufficient acknowledgment. *Rackham v. Marriott*, 2 H. & N. 196; *Banning*, Statute of Limitations, 52. But see *Gardner v. M'Mahon*, 3 Q. B. 561. In this country, also, the law is in a somewhat unsettled condition. 1 Wood on Limitations, 228. The line of North Carolina decisions culminating in the principal case directly contravenes the Statute requiring all acknowledgments to be in writing, and forms another illustration of the same desire to prevent the legislature from working injustice, which in many instances has nullified the Statute of Frauds. In Maine, the courts have gone to the opposite extreme, and will not allow an action for breach of a parol agreement, upon good consideration, not to take advantage of the defence of limitations. *Hodgdon v. Chase*, 32 Me. 169. That is straining the Statute for the sake of working a hardship, and is less easily justified than the course taken in North Carolina.

**CORPORATIONS — DEALINGS WITH STOCKHOLDER — NOTICE.** — A corporation purchased land from two persons, who held the record title, and also owned most of the corporate stock. No one representing the corporation, except one of the grantors, knew that the land was affected by an unrecorded trust instrument. *Held*, that his knowledge



was not to be imputed to the corporation, and that it was a purchaser without notice. *Whittle v. Vanderbilt Mining Co.*, 83 Fed. Rep. 48.

The general rule is that notice to the agent is notice to the principal, or, as it is more commonly stated, it is presumed that facts in the knowledge of the agent have been communicated to the principal. Story on Agency, § 140. But where the agent is acting on his own behalf, adversely to the principal, the rule does not apply. Obviously, there can be no presumption that the agent will communicate facts within his knowledge which it is for his advantage to conceal. *Frenkel v. Hudson*, 82 Ala. 158. Under such circumstances, he ceases to be an agent in any real sense, and becomes, for the purposes of the transaction, a stranger. 4 Thompson on Corporations, § 5206.

**CRIMINAL LAW — ASSAULT AND BATTERY — CONSENT.** — Defendant, a druggist, at a purchaser's request, sold croton oil to him concealed in candy, and in sufficient quantities to produce injury. Defendant believed that it was to be administered to some person as a joke, and not for medicinal purposes. The purchaser administered it to X, who was injured thereby. *Held*, that defendant is guilty of an assault and battery. *State v. Monroe*, 28 S. E. Rep. 547 (N. C.).

It was a statutory misdemeanor to retail croton oil without a label, but this fact had no influence upon the result. The force in an assault and battery may be applied internally, and defendant was at least criminally negligent. *Carr v. State*, 135 Ind. 1. The English law was at one time in accord with the principal case. *Reg. v. Bulton*, 8 C. & P. 660. The later cases overruled *Reg. v. Bulton*, but their evil effect has been largely obviated in England by statute. *Reg. v. Hanson*, 2 C. & K. 912. The principal difficulty arises on the question of consent, as the consent of the injured party is a defence in many misdemeanors. Consent is not present in these cases, however, for, because a party accepts one article, he does not necessarily consent to accept another different article concealed therein. *Com. v. Stratton*, 114 Mass. 303. It is not a case of fraud vitiating consent, for there is no consent. Failure to recognize the above distinction was the cause of the erroneous decision in *Reg. v. Clarence*, 22 Q. B. 23.

**CRIMINAL LAW — FALSE PRETENCES — OBTAINING CREDIT BY FRAUD.** — Defendant entered a restaurant, and ordered and partook of a meal, having at the time no money in his possession with which to make the customary cash payment. *Held*, the evidence will not support a conviction for obtaining goods by false pretences, but defendant was properly found guilty (under another count) of the statutory crime of obtaining credit by fraud. *Regina v. Jones*, [1898] 1 Q. B. 119.

The jury found that the defendant intended to represent by his conduct that he was able and willing to pay immediately. The court, however, was of opinion that this verdict was not warranted by the evidence, but upheld the conviction on the second count, on the ground that while a false pretence is essential to the former crime, the latter may be committed by any species of sharp dealing that may be denominated fraud. A further difference between the two offences is, that the crime of false pretences includes an obtaining possession of goods, while the other misdemeanor requires merely a securing of credit. Following out this line of reasoning, it may be urged that the present defendant never acquired possession of the food until it could no longer be called "goods," and that this transaction was a sale not of the food, but of the right to eat it. If this be correct, the defendant clearly could not be convicted of obtaining goods under false pretences. However, even if the distinction is sound, it is so subtle a refinement that it is impossible that it should be generally adopted. The reason given by the court is, therefore, the better ground on which to rest the decision.

**EQUITY — CORPORATIONS — ANSWER UNDER SEAL.** — *Held*, that, although a bill in equity by a corporation need not be under seal, the answer of a corporation to a bill must be. *R. Frank Williams Co. v. United States Baking Co.*, 38 Atl. Rep. 990 (Md.).

Why a seal should be required for one pleading rather than another, is not clear. The case is a curious illustration of the conservatism of courts in dealing with technical rules which have no longer any reason for existing. In *Ransom v. Stonington Savings Bank*, 13 N. J. Eq. 212, commonly cited for the doctrine of the principal case, the court admitted that the reason for the rule is obsolete. The better modern view is that a seal is necessary for a corporation only when it is necessary for an individual. 2 Morawetz, Corporations, 2d ed., § 338. The rule in the principal case must often be inconvenient, and both equity practice and the law of corporations might well be simplified by discarding the superstition about corporate seals. See 2 HARVARD LAW REVIEW, 117-121; *Larrison v. P. A. & D. R. Co.*, 77 Ill. 11.

**EQUITY — DIVORCE — PHYSICAL EXAMINATION.** — *Held*, that in an action to annul a marriage on the ground of physical disability, the court has power to direct a surgical examination of the defendant. *Cahn v. Cahn*, 48 N. Y. Supp. 173.

The right to physical immunity is most carefully guarded by the law, and is not to

be infringed unless the authority is clear and unquestionable. *Cooley on Torts*, 29. An examination will not be ordered in an action for personal injuries. *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250. But to save the life of an unborn child, a writ *de ventre inspiciendo* has been issued. *In re Blakemore*, 14 L. J. N. S. Ch. 336. The authority in the principal case rests on the grounds that the privacy of the individual must yield to the necessity of the community, *Davenport v. Davenport*, 5 Paige, 554; and that only on the clearest proof will the marriage be annulled. The confession of the defendant is not sufficient, *Welde v. Welde*, 2 Lee Ecc. 580; nor is the unsupported testimony of the plaintiff. *U— v. J—*, 1 L. R. 1 Prob. & Div. 460. The doctrine of the principal case arose in the ecclesiastical courts, *Briggs v. Morgan*, 2 Hagg. Conn. 324; and has been generally followed, *Le Baron v. Le Baron*, 35 Vt. 365; *Anon.*, 35 Ala. 226; *Shafte v. Shafte*, 25 N. J. Eq. 34; but is apparently rejected in Ohio, 2 West. L. J. 131.

**EQUITY — PRIORITY — PURCHASE FOR VALUE WITHOUT NOTICE.** — *Held*, that a trustee of an equitable claim cannot make a fraudulent release or assignment to a purchaser for value without notice which will bar the *cestui*. *Evans v. Roanoke Savings Bank*, 28 S. E. Rep. (Va.).

The facts in this case are very complicated, but the point seems to be squarely raised and decided. The authorities on this and apparently analogous questions are hard to reconcile. See Langdell Eq. Pl., Ch. VII.; 2 Pomeroy Eq. Jur., 2d ed., §§ 677-785; 1 HARVARD LAW REVIEW, 1. The principal case is emphasized by its possible conflict with the recording act pointed out by two dissenting judges.

**INTERPRETATION OF STATUTES — MECHANIC'S LIEN — LABOR ON DITCH.** — A statute gave a lien for labor in constructing an irrigating ditch both on the ditch and on so much land as might be required for its convenient use. *Held*, the lien extends to the tract for whose irrigation the ditch was constructed. *Springer Land Assn. v. Ford*, 18 Sup. Ct. Rep. 170. See NOTES.

**PARTNERSHIP — TWO FIRMS WITH A COMMON PARTNER.** — *Held*, a firm or its assignee may maintain an action against another firm to recover an indebtedness, although the firms may have common partners. *Mangels v. Shaen*, 48 N. Y. Supp. 526.

The partners hold the legal title to firm property. *Holmes v. Jarrett, Moon, & Co.*, 7 Heisk. 506. Since in a suit at common law by or against the firm the partners must all be joined, the difficulty arises, if the firms have a common partner, that the same party is both plaintiff and defendant; and this has been held insurmountable. *Bosanquet v. Wray*, 6 Taunt. 598. That a statute allowing the firm to sue or be sued in the firm name would obviate the difficulty has been suggested. Lindley on Partnership, 4th ed., 469. But equity will give relief in accordance with the mercantile conception that the firm is an entity distinct from its partners. *Piercy v. Fynney*, 12 Eq. 69; *Taylor v. Midland Ry. Co.*, 28 Beav. 287; s. c. 8 H. L. C. 751. The principal case belongs to that class where the law has adopted the equitable and mercantile view. *Cole v. Reynolds*, 18 N. Y. 74; *Menagh v. Whitwell*, 52 N. Y. 146; *Taylor Co. v. McClung*, 24 Houst. 24; *Fern v. Cushing*, 4 Cush. 357.

**PERSONS — ACTION BY WIFE AGAINST HUSBAND — PERSONAL INJURIES.** — *Held*, that a wife cannot maintain an action against her husband for assault and battery; but as this doctrine rests on the unity of person, the court cannot, in dismissing her complaint, award costs against her. *Abbe v. Abbe*, 48 N. Y. Supp. 25.

That a wife could not sue her husband in tort at common law is clear. *Stewart, Husband and Wife*, § 48. While the Married Woman's Acts in the various States have to a large extent separated the personality of the wife from that of her husband, and removed most of her disabilities, what few cases have arisen are in accord with the principal case in holding that the Acts do not extend to allowing her to sue for personal injuries by him. *Peters v. Peters*, 42 Iowa, 182.

On the point as to costs, the reasoning of the court is rather curious, but seems perfectly sound. As the husband and wife are at common law one person, a dismissal of her complaint is to be considered as a judgment against the successful party. For the authorities as to costs, see *Stewart, Husband and Wife*, §§ 437, 463.

**PROCEDURE — ARGUMENTS TO JURY — READING LAW BOOKS.** — *Held*, that permitting counsel, against objection, to read to the jury reports of cases, is error. *Griebel v. Rochester Printing Co.*, 48 N. Y. Supp. 505.

In criminal cases, it has been the practice in a few of the States to allow counsel to address the jury on questions of law, and to read from text-books and reports. This has rested rather on long-continued custom than on any theory that the jury are to judge both of law and of fact. *Com. v. Porter*, 10 Met. 263. In civil cases, it has been held almost universally that the jury must take the law from the court, and that counsel



should not be allowed to argue questions of law to them. 1 Thompson on Trials, 720. Even where books are permitted to be read to the jury, the extent of their use is to be limited by the sound discretion of the court. *Com. v. Austin*, 7 Gray, 51.

PROPERTY — ADVERSE POSSESSION. — The plaintiff and A were owners of adjoining land, and erected a fence between their lots. By mistake as to the boundary a strip of the plaintiff's land was included in A's lot. A conveyed to the defendant, who remained in possession for more than twenty years, believing he was the owner of the strip. *Held*, the defendant, in the absence of a hostile claim brought to the notice of the plaintiff, had not acquired a title by adverse possession. *Rasdoll v. Shumway*, 51 Pac. Rep. 285 (Kan.).

This case follows a previous Kansas decision. *Winn v. Abeles*, 35 Kan. 85. And there are decisions to the same effect in other jurisdictions. *Grube v. Wells*, 34 Iowa, 148; *Brown v. Gay*, 3 Greenl. 126; *Brown v. Cockerell*, 33 Ala. 38. But the better doctrine is that the intention of the possessor is immaterial. If in fact he takes possession of the land, not under the true owner and hence adversely to him, there is a disseisin, and the Statute of Limitations should run from that time. *French v. Pearce*, 8 Conn. 439.

PROPERTY — BONA-FIDE PURCHASER — NOTICE BY POSSESSION. — A deeded land to B and C in common, and B afterward quit-claimed to C. Later B executed a deed purporting to convey an undivided half interest in the land to D, a purchaser for value without actual notice of B's deed to C. D's deed was put on record, but the earlier deeds were not recorded. At the time of the deed to D, C was in actual possession of the land. *Held*, that D got no title as against C. *Jones v. Brenizer*, 73 N. W. Rep. 255 (Minn.).

The court rests its decision on two grounds. The first is that D is entirely outside the protection of the registry laws, since he bought from one who had no record title. The reasoning is unsound, since, as to the moiety in dispute, C claims under the same grantor, B, as D claims under, and cannot properly take any advantage of the fact that the deed to B was not on record. In a contest between C and D there is no reason for going back of their immediate common grantor. The other ground for the decision is that C's possession was constructive notice to D of the unrecorded deed from B to C. It is the prevailing, though by no means universal, doctrine that exclusive, notorious possession under an unrecorded deed is constructive notice to all concerned of the existence of that deed. *Wade on Notice*, ch. iv. But C's possession was not apparently exclusive, since he was supposed to be a tenant in common with B, and the possession of one tenant in common is not adverse to his co-tenant. There was nothing to put D on his guard against C, and the court went too far in applying the general rule to this case. See *Wade on Notice*, 2d ed., § 290.

PROPERTY — RECORD OF MORTGAGE — CONSTRUCTIVE NOTICE. — The grantor of land took a mortgage back for a part of the purchase-money. The mortgage was recorded, and contained a recital of the earlier deed by the mortgagee to the mortgagor, which was not recorded. *Held*, that a later purchaser from the grantor had no constructive notice of the unrecorded deed. *Sternberger v. Ragland*, 48 N. E. Rep. 811 (Ohio).

Notice of the recorded mortgage would be notice of all its contents, and hence of the recorded deed recited in it. *Wade on Notice*, 2d ed., § 15. But the court holds that the purchaser had no constructive notice of the mortgage, since it was made by an apparent stranger to the title to one who already had a good record title by an earlier recorded deed. In looking down the records, an intending vendee, after finding this earlier deed putting title into his vendor, would look only for deeds which might get the title out again, and so would not see a later deed to the vendor. If he were following the records back, however, he would naturally find the later deed first. In view of the uncertainty as to which method he would adopt, it seems fairer and more consonant with the spirit of our registry laws not to fix him with notice. It is hard, however, to see how this view can consistently be taken in those States where a later purchaser has constructive notice of recorded deeds made by his grantor before acquiring title. In accord with the principal case are *Veazie v. Parker*, 23 Me. 170, and *Pierce v. Taylor*, id. 246, apparently the only cases quite in point.

SALES — SHIPMENT OF LIQUOR — PLACE OF SALE. — Where liquor is sent C. O. D., the title passes when the vendor delivers the goods to the carrier. *James v. Commonwealth*, 41 S. W. Rep. 1107 (Ky.). See NOTES.

TELEGRAPH COMPANIES — LIABILITY TO ADDRESSEE. — Defendant company was negligent in the transmission of a message addressed to plaintiff, whereby plaintiff suffered damage. The message purported to be sent subject to the regulations printed



thereon, one of which was that claims for damages must be presented within sixty days. *Held*, that as the defendant's duty to use care toward plaintiff did not arise out of contract but was imposed by law, the plaintiff was not bound by the stipulation unless he had assented thereto. *Webbe v. W. U. Tel. Co.*, 48 N. E. Rep. 670 (Ill.).

In England, the telegraph company seems to be under no duty (in the absence of fraud) except such as arises out of contract. Unless the receiver can show a contract, as where the sender is his agent, he cannot sue the company. *Dickson v. Reuter's Tel. Co.*, 3 C. P. D. 1. Where a contract does exist, the above stipulation would be binding, since it is reasonable. But in this country it is generally held that the company is under a duty imposed by law to exercise care. *W. U. Tel. Co. v. Dubois*, 128 Ill. 248. On this view, the reasoning in the principal case seems sound. A contract between A and B cannot affect a duty which B owes C. The authorities generally are in accord. *W. U. Tel. Co. v. McKibben*, 114 Ind. 511. The decisions *contra*, other than those which proceed on the idea of a contract, are usually put on the ground that this is a reasonable regulation which the company has the right to make. *Ellis v. Am. Tel. Co.*, 13 Allen, 226.

Even if the plaintiff had assented to the stipulation, it is difficult to see how it could have had any effect. No doubt a binding contract would be a defence, but this would not often be found, owing to the lack of consideration.

**TORTS — CONVERSION — MARRIED WOMEN.** — A shop-keeper sold and delivered goods to a married woman for immediate consumption. *Held*, although the contract of sale was void, yet the intended vendee is not liable in trover, where the goods had been consumed before a demand and refusal. *Locke v. Reeves*, 22 So. Rep. 850 (Ala.).

This particular point is one of those obvious and elementary propositions of law for which the authority of decided cases is often strangely lacking. The general rule is that no one can be held legally responsible for the repudiation of a void contract. So far is this principle carried, that an act on for deceit will not lie against a *feme covert*, for obtaining goods by fraudulently representing herself to be sole. *Liverpool, etc. Association v. Fairhurst*, 9 Ex. 422; *Keen v. Hartman*, 48 Pa. St. 497. In the principal case, it is not necessary to go to such lengths. For, although the agreement is void as a sale, it is valid as a license; and, until the original owner revokes the authority to use the goods and makes a demand for them, he cannot complain of any acts of ownership exercised by the licensee. Cf. *Wilt v. Welsh*, 6 Watts, 9, 12; but see *Campbell v. Stokes*, 2 Wend. 137. In the present instance, the plaintiff made no demand until the property had ceased to exist; and the failure to surrender then because of the impossibility of so doing is no evidence of conversion.

**TORTS — DECEIT — INTENT.** — Plaintiff's agent bought machinery for him from defendant, who signed a contract of sale in which the consideration was stated as \$3000, when in fact it was only \$1625. This statement enabled the agent to cheat plaintiff out of the difference. *Held*, that plaintiff could not recover unless defendant intended the result that occurred. *Thorp v. Smith*, 51 Pac. Rep. 381 (Wash.).

It is evident from the record that the recital of the consideration was put into the contract with the expectation that third parties would act in reliance upon it. As plaintiff did so act and was thereby damaged, there is no good reason why he should not recover, even though defendant did not specially contemplate him as likely to be deceived. *Bedford v. Bagshaw*, 4 H. & N. 538. The defendant did not suppose any damage would be done, since he considered the property worth \$3000, is no defence, as the court seems to think it is, nor is the fact that defendant did not expect to gain anything for himself by the deception. *Foster v. Charles*, 7 Bing. 105. It is submitted that the court was also wrong in holding that negligence on plaintiff's part in not making further inquiries would interfere with his right of recovery. *Cottrill v. Krum*, 100 Mo. 397.

**TORTS — IMPUTED NEGLIGENCE.** — The plaintiff's intestate was about to drive across the track of the defendant's road, and requested X, a bystander, to look for approaching trains. At a signal from X, the intestate drove upon the track, and was killed. *Held*, the negligence of X was imputable to the intestate, and the plaintiff could not recover. *Bronson v. N. Y., etc. Ry. Co.*, 48 N. Y. Supp. 257.

There seems to be no necessity of evoking the doctrine of imputed negligence. The intestate himself was plainly negligent in delegating the duty of looking for trains to a stranger of whose competency he was ignorant, and on that ground the plaintiff should have failed. *Brickell v. N. Y., etc. Ry. Co.*, 120 N. Y. 290. But however that may be, the doctrine of imputability was properly applied. X, at the time of the accident, was a servant of the intestate, and on principles of agency his contributory negligence should prevent the master or his representatives from recovering. *Bishop, Non-Contract Law*, sec. 1069. That the intestate had constituted X his agent and

was exercising control over him is the decisive fact, for the general rule is that the contributory negligence of a third person cannot be imputed to a plaintiff who is himself without fault. *Mills v. Armstrong*, L. R. 13 App. Cas. 1; *Little v. Hackett*, 116 U. S. 366.

TRUSTS — PRECATORY WORDS. — A wife devised the residue of her estate to her husband, adding this clause: "It is my wish and desire that he shall furnish a home and maintenance to my father for life should he need it." *Held*, this imposed a binding trust. The wish of a testator, like the request of a sovereign, is equivalent to a command. *Foster v. Willson*, 38 Atl. Rep. 1003 (N. H.).

The subject of "precatory trusts" was discussed in 11 HARVARD LAW REVIEW, 261. The decision in the principal case seems to be based upon a test formerly applied in equity, but abandoned in later cases.

TRUSTS — STATUTE OF WILLS — PAROL EVIDENCE. — A will contained an absolute devise to a subscribing witness. The testator intended the gift to be on trust. Of this the devisee had knowledge prior to the making of the will, and made no objection. *Held*, that the testator's intent could not be shown by parol evidence, because of the clause concerning wills in the Iowa Statute of Frauds. The devisee, therefore, took an absolute interest, and the devise to him was void. *Moran v. Moran*, 73 N. W. Rep. 617 (Iowa).

The correctness of the decision depends upon whether there was a trust enforceable against the subscribing witness. If there was, he did not have a disqualifying interest. This is a question arising under the provision in the Statute of Frauds concerning trusts in lands, and not that in regard to wills. The devisee, having knowledge of the testator's ante-testamentary proposal to make him a trustee, agrees by his assent, express or to be implied from his silence, to carry out the trust upon receipt of the *res*. The *res* is conveyed by will, duly executed according to statute. The question that then arises is not upon the validity of the will, but upon the enforcement of the parol ante-testamentary agreement. Such a parol agreement cannot be enforced when land is conveyed by deed. But by the great weight of authority, it is enforceable when the conveyance is by will, although on theory no distinction should be made. *Mucklestone v. Brown*, 6 Ves. 52; *Barrell v. Hanrick*, 42 Ala. 60; *O'Reilly's Appeal*, 154 Pa. 485.

The formalities required by § 1934 of the Iowa Code of 1873, for the creation of trusts in land, were not complied with in the principal case. If this section applies to wills, the result might be supported on that ground. But this point the court expressly refuses to decide.

WILLS — CONSTRUCTION — ELECTION. — The testator made a will, giving land subject to a legacy and a charge to A, whom he named as executor. Subsequently the testator gave A a deed in fee of the land. On the testator's death, A qualified as executor. *Held*, that A, having undertaken the execution of the will, had elected to take under the will, and so held the land subject to the charge. *Allen v. Allen*, 28 S. E. Rep. 513 (N. C.).

Where a man by deed or will gives property to A, and by the same instrument assumes to give some of A's own property to B, it is a rule of equity that A must either renounce the instrument entirely, or if he takes under it, must allow his property to go to B, unless it appears from the instrument that A was to have his gift at all events. This is the doctrine of election, and is based on the presumed intention to impose a condition which is binding on A's conscience. 2 Story Eq. Jur., 13th ed., §§ 1075-1099. The principal case misapplies this doctrine. The devise subject to the charge was revoked by the conveyance during the testator's life. The case, therefore, makes a will for the testator in direct opposition to his duly expressed wishes.

## REVIEWS.

HANDBOOK OF THE LAW OF EVIDENCE. By John J. McKelvey. St. Paul, Minn.: West Publishing Co. 1898. pp. xii, 468.

This latest volume of the *Hornbook Series* deals with one of the important divisions of the law with certainly all the compactness that is permissible. Mr. McKelvey has endeavored to strike a mean between "the meagreness of Stephen's Digest, on the one hand, and the unwieldy



fulness of detail characteristic of some of the larger works, on the other." He has met with a commendable degree of success. The whole range of topics of the law of evidence and of those generally considered with it is covered, and the treatment, while in no case exhaustive, is almost uniformly clear in its brevity. It is doubtful if such a book would be a satisfactory medium through which to introduce the novice into the mysteries and complexities of the law of evidence; such a one might well feel that he had here and there missed a step, and that he was hurried from one topic to another before he had probed to the very bottom of the first. Indeed, for the fundamentals, for the purely historical basis of many of the exceptions to the hearsay rule for instance, the student must go to another book. To one who has some acquaintance with the rules of evidence, however, this book adequately performs the service of refreshing the recollection, and is what it purports to be, — a handbook in which leading principles are correctly and succinctly stated. The "summings-up," if the expression may be permitted, are excellent. Lawyers and judges who require a ready knowledge of the subject will find Mr. McKelvey's book a source of strength and comfort.

The book is deserving of praise in that very little of positive error is found between its covers. There is almost none of that confusion, so generally to be met with in treatises on evidence, of giving a term a certain meaning on one page, another meaning on perhaps the next page, and still a third in another part of the book, which results apparently from an inability to treat questions of evidence with anything like definiteness. In the first place, the author has shut out a large field for possible misunderstanding by noticing that it is only after the positive rules of law and of pure logic have had full play that the rules of evidence properly exert their influence. Then, too, the line of demarcation between what are and what are not questions in the law of evidence has seldom been so accurately and firmly drawn as here. Finally, to speak of specific matters, it is satisfactory to find the nature of the burden of proof and of a presumption explained with the precision that they demand, and to which they are entitled. In giving things their right names, the author has certainly performed a service.

In his preface, Mr. McKelvey acknowledges the assistance he has derived from Professor Thayer's collection of Cases on Evidence, and he makes numerous citations from the learned author's notes in that work, and from his articles in the *HARVARD LAW REVIEW*. No disparagement is intended to Mr. McKelvey in saying that a great part of what is valuable in his book is clearly due directly to the teaching of Professor Thayer. The fact is apparent, and the author in no way seeks to conceal it. Better is it, however, that Mr. McKelvey should be lacking in originality than that his book should be less sure in tone and less logical in its arrangement.

R. L. R.

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**LAW-LATIN.** — A Treatise in Latin, with Legal Maxims and Phrases as a Basis of Instruction. By E. Hilton Jackson. Washington, D. C. : John Byrne & Co. 1897. pp. xiv, 219.

Whether this ingenious little book fulfills, in the usual phrase, a long-felt want, would be hard to say. A knowledge of Latin is convenient, but perhaps hardly indispensable to the modern American lawyer. There may very probably exist, however, a considerable number of law students with no knowledge of Latin, who would like to acquire a little, merely to



aid them in their profession. For such persons this work is very well adapted. Mr. Hilton's course of instruction is brief but well planned, his grammar remarkably compendious, but sufficient for the purpose, and his vocabulary hardly more scanty than is proper for his design. To those who already know a little Latin the interest of the book lies in the list of legal maxims and phrases. This possesses a great deal of merit. The selection, though capable of improvement, is perhaps the best yet extant, embracing 385 headings; and the annotations are commendable for their brevity and unpretentious simplicity. Elaborate attempts to define the application of such maxims as if they were rules of law are a sheer waste of time. Extended criticism of them is profitable only when done from a broad historical point of view, as in Judge Smith's article in 9 HARVARD LAW REVIEW, 13. The work as a whole is accurate as far as is consistent with the omission of all exceptions and qualifications, the only palpable slip noticed being in the vocabulary under the head of *vere*.

R. G.

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A COLLECTION OF OHIO AND FEDERAL CASES ON THE INTERPRETATION AND CONSTRUCTION OF STATUTES. By Francis Bacon James. Cincinnati: W. H. Anderson & Co. 1897. pp. xi, 229.

Paving the way for a collection of cases on the general subject of interpretation and construction of statutes, Mr. James has published this book of selected cases dealing strictly with statutes of the United States and the State of Ohio. Cases are given from the reports of the Supreme Court of Ohio and of the Federal courts. To say that the cases are well selected, well arranged, and well indexed is the highest praise that can be given to a work of this nature; and in all of these respects Mr. James' work is satisfactory. Its primary usefulness is of course confined to Ohio, although the principles involved in the cases must be the same in other States, and the Federal cases have a broader application. The careful compilation promises well for the more inclusive collection now being prepared.

J. G. P.

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ABBREVIATIONS USED IN LAW BOOKS. By Charles C. Soule. The Boston Book Company: Boston, Massachusetts, 1897. pp. 150.

As Mr. Soule's valuable Lawyer's Reference Manual has been allowed to go out of print during the preparation of a new edition, this reprint of that portion of the manual most constantly used by the profession will be of immediate and practical service to many lawyers who do not possess the first edition of the entire work. It is, however, merely a reprint from this first edition of 1883, and is not brought down to date. The new edition of the Manual itself promises to be exceptionally complete, but unfortunately its appearance cannot be expected for some time to come.

H. D. H.

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REPORT OF THE TWENTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Philadelphia: Dando Printing Co. 1897. pp. 592.

The proceedings at the last annual meeting of the American Bar Association, held at Cleveland, Ohio, on August 25th, 26th, and 27th, 1897, are here printed in full, with the constitution and by-laws of the Association, and a list of members. The larger part of the book, however, is the Appendix, containing the various papers read. These were the addresses of

the President, James M. Woolworth, reviewing the legislation of the year and the general state of the law ; the address of Governor Griggs of New Jersey, on "Law-making ;" essays by Robert Mather and Prof. Eugene Wambaugh on "Constitutional Construction and the Commerce Clause," and "The Present Scope of Government ;" papers read before the Section of Legal Education, by Henry E. Davis, John A. Finch, and Charles N. Gregory, on "Primitive Legal Conceptions in Relation to Modern Law," "The Law of Insurance in the Law School," and "The Wage of Law Teachers;" the reports of various committees, and several obituaries. It is impossible to say here more about these many and various papers than that most of them will well repay reading. As a catalogue, moreover, and handbook of the Association, the book will be useful to every member.

R. G.





# HARVARD LAW REVIEW.

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## GOVERNMENT BY INJUNCTION.

VILLARI has pointed out that when Machiavelli, the great Florentine, wrote his celebrated treatise on the "Art of War" ("L'Arte Della Guerra"), that shrewd and subtle observer expressed an almost entire want of belief in the efficacy of firearms which nevertheless destroyed the old and created the new system of tactics.

Having this in mind, it behooves us to beware lest we too lightly regard either the introduction of new principles or the great extension and novel application of old principles in our art of forensic contest. It seems timely to discuss the system of injunctions enforced by process of contempt against all persons within the jurisdiction, which has within the past few years been brought into use by some of our highest courts, and which has been so often referred to as "*Government by Injunction.*"

The writ of injunction is of course not a new writ, nor is the proceeding in contempt for its enforcement a novelty in our law. These, like other writs and proceedings, having once been invented and made use of by the courts, and being found useful or convenient, have had a more and more extended use and application as time has gone on.

Mr. Beach, in his recent and comprehensive work on injunctions, says, "In its accepted legal sense, an injunction is a legal process or mandate operating *in personam*, by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing."

It is probably inevitable that the development of a department of government which has the exclusive right to construe and define its own jurisdiction should illustrate the maxim quoted by Lord Chesterfield, that "there are misers of money but none of power." It is not in the courts a mere wanton assumption of dominion, however. Cases arise, the extension of a writ to new circumstances is pressed for, and we of the Bar urge on the Bench not to deny it, and therefore we share the responsibility for the constantly increasing control of the judiciary. It is not easy to emulate that splendid impartiality which Chief Justice Marshall displayed when his life-long enemy and opponent, the profligate intriguer, the slayer of his friend Hamilton, stood before him to be tried for his life. "That this court does not usurp power is most true," said the great Chief Justice; "that this court does not shrink from its duty is no less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without reproach, would drain it to the bottom. But if he have no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace." The scales were held with even hand against the clamor of the mob and of his own heart, and if the accused went free, Justice went stainless, for, as the angry prosecutors declared, "Marshall stepped in between Burr and Death."

It is not easy for average men to rise up to so high a standard of duty, nor is it easy for judges, admitting, as we ought, that they are selected men, averaging in many ways above their fellows. If any criticisms are here indulged, or restraints are here suggested, it is hoped they will not be construed as reflections upon the character, attainments, or purpose of our judges, State and National, whom we may well rank as the best and purest of our public servants.

Turning back to the growth of the injunctive power, the doctrine seems to have been early declared that, with certain very limited exceptions, an injunction could issue only against a party to the suit in which it was prayed (or to those acting under his authority). This was examined by Lord Eldon in the much-cited case of *Iveson v. Harris*,<sup>1</sup> where that eminent equity judge declared: "I have no conception that it is competent to this court to hold a man bound

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<sup>1</sup> 7 Ves. p. 256.

by an injunction who is not a party in the cause for the purpose of the case. The old practice was that he must be brought into court, so as, according to the ancient laws and usages of the country, to be made a subject of the writ."

In 1819<sup>1</sup> application was made to our great American Chancellor (Kent) to dissolve an injunction as to three persons, not parties to the bill. The case in *7 Vesey, supra*, was cited, and the Chancellor held it correct and applicable, quoting and adopting Lord Eldon's words, observing: "I find the court has adhered very closely to the principle, that you cannot have an injunction except against a party to the suit." . . . "The court has no right to grant an injunction against a person whom they have not brought or attempted to bring before the court by subpœna."

The doctrine of these cases has been frequently affirmed by courts and text-writers, and the general rule of law as there stated will be found announced by the best and latest writers on the topic of injunction.

But the courts have gone on to hold that, having acquired jurisdiction over property, they might enjoin interference with it by any person, whether a party to the litigation or not.

The doctrine having been well established that injunctions would not issue to prevent the commission of crime, and that courts of equity would not undertake police and executive functions in general, yet an exception was made, and as the courts could enjoin any irreparable injury to property, they held that they could enjoin acts, even criminal, if they were shown to be of such a character as would occasion irreparable injury to property.

Under this latter head great extensions of the scope of injunctions have been made within the past few years in which they have issued to prevent riotous or unlawful conduct in strikes or labor battles. This has led to the most heated discussion of a branch of equity, which has suddenly become a matter of popular interest and controversy, and, as it were, a burning question.

W. H. Dunbar, Esq., of Boston, in a lucid and able article in the "Law Quarterly Review" of London,<sup>2</sup> points out that "to Vice-Chancellor Malins appears to belong the distinction of first exerting the powers of a court of equity to protect employers against their striking employees." "In *Springhead Spinning Company v. Riley*<sup>3</sup> he granted an injunction restraining the defendants, the president

<sup>1</sup> *Fellows v. Fellows*, 4 Johns. Ch. 25.

<sup>2</sup> 13 L. Q. R. p. 348, Oct., 1897.

<sup>3</sup> L. R. 6 Equity, 551.



and secretary of a trades union and a printer employed by them, from posting placards and publishing advertisements urging workmen to keep away from plaintiff's factory, where a strike due to a reduction of wages was in progress." But, adds Mr. Dunbar, "The opinion in support of this decision was strongly disapproved by the court of appeal in *Prudential Ass. Co. v. Knott*; <sup>1</sup> and Chief Justice Gray of the Supreme Judicial Court of Massachusetts, now Mr. Justice Gray of the United States Supreme Court, declared that it appeared to be so inconsistent with the authorities and with well-settled principles that it would be superfluous to consider whether upon the facts before him his decision can be supported."<sup>2</sup> "In America," continues Mr. Dunbar, "the resort to equity in labor troubles has been very common."

Thus in 1888 the Supreme Court of Massachusetts<sup>3</sup> held that "banners displayed in front of a person's premises with inscriptions calculated to injure his business and to deter workmen from entering into or continuing in his employment constitute a nuisance which equity will restrain by injunction."

In that case, the defendants, who were officers of the Lasters' Protective Association, with the consent of their association and out of its money caused to be carried in front of Sherry's factory, by a boy hired for that purpose, a banner bearing the following inscription: —

"Lasters are requested to keep away from P. P. Sherry's.

"Per order L. P. A."

The opinion is brief, and depends almost wholly, it may be observed, on English precedents.

In 1893, the Supreme Court of Pennsylvania held, in *Murdock v. Walker*,<sup>4</sup> that an injunction will lie to restrain persons from attempting by force, menace, or threats to prevent workmen from working on such terms as they may agree on with any employer. Said one of the employers in this case to one of those interfering with his workmen, "Our men are getting sick and tired of this;" and the reply was, "That is what we are here for, to make them sick and tired." The injunction was not merely against threats, menaces, and intimidation, but "opprobrious epithets, ridicule, and

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<sup>1</sup> L. R. 10 Ch. 142.

<sup>2</sup> *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass. 69, 70.

<sup>3</sup> *Sherry v. Perkins*, 147 Mass. 212.

<sup>4</sup> 152 Pa. St. 595; 25 Atl. Rep. 492.

annoyance" as well. A joke at one of the workmen was a contempt of court. No opinion was filed by any judge, only a direction *per curiam* affirming the action of the lower court.

The same court in 1894<sup>1</sup> held the lower court right in granting a preliminary injunction against the members of a labor union alleged to have combined and conspired to prevent plaintiff, by threats and violence, from employing other workmen in its factory. The opinion is very brief, and cites no authority.

In the same year the case of *Barr v. Essex Trades Council*<sup>2</sup> was decided, wherein an elaborate opinion by Vice-Chancellor Green covering thirty-five pages was filed, and the English and American cases were carefully considered. The conclusion was reached that "a person's business is property entitled under the constitution to protection from unlawful interference. Every person has a right as between his fellow-citizens and himself to carry on his business within legal limits according to his own discretion and choice, with any means which are safe and healthful, and to employ therein such persons as he may select, and every person is subject to the correlative duty arising therefrom, to refrain from any obstruction of the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others."

The facts considered were these: B, the proprietor of a daily newspaper, determined to use plate matter in the make-up of his paper, notwithstanding the interdictive resolution of the local typographical union. The affiliated "unions," comprising a body of operatives in the county of a purchasing capacity of \$400,000 a week, issued through the trades council a circular calling on all friends to boycott the paper and to cease buying it and advertising in it. It was also suggested that those who continued to deal with the newspaper would incur the enmity of organized labor.

It was held that there was no adequate legal remedy under these circumstances, and equity would intervene by injunction to prevent irreparable damage or a multiplicity of suits in such a case of continuing injury.

The application of the writ of injunction to the enforcement of penal statutes has been not infrequently provided for in the statutes themselves, especially in liquor and excise laws, and in various federal enactments.

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<sup>1</sup> *Wick China Co. v. Brown and 26 others*, 164 Pa. St. 449; 30 Atl. Rep. 261.

<sup>2</sup> 53 N. J. Eq. 101.

Mr. Arthur C. Rounds, in an article in 9 HARVARD LAW REVIEW, p. 521, mentions that the Interstate Commerce Act,<sup>1</sup> the Anti-Trust Act,<sup>2</sup> and the Tariff Act of 1894,<sup>3</sup> all provide for restraints on their violation by courts of equity. Mr. Dunbar points out in the article referred to above that laws of this type have been held constitutional by the Supreme Court of the United States, and of several States whose decisions are highly considered.<sup>4</sup>

That the legislative power may extend the writ of injunction as an executive means to the enforcement of a statute, penal or otherwise, must therefore be deemed fully established. The common device in these enactments is to declare the offence, as the keeping of a place for the unlawful sale of liquors, a nuisance, and provide for its abatement by the injunctive order of the court at the suit of the public or persons suffering a certain injury therefrom.

The federal judge with his life tenure comes nearer to the ideal judge for whom Marshall declared in the Constitutional Convention of Virginia in 1829 as "rendered perfectly and completely independent, with nothing to control him but God and his conscience," than judges whose honors and emoluments must be restored to them at frequent intervals by popular vote or be forfeited.

The injunctions issued by the federal courts, as might have been foreseen, have been of especial importance in the controversies arising out of strikes and labor difficulties.

The courts rest jurisdiction on various grounds, but mainly under three heads: First, on their right to protect receivers appointed by them in the possession and management of the property intrusted to them. Secondly, on their general right to protect suitors, entitled to come into their forum, from irreparable injury to property and multiplicity of suits. Thirdly, under federal statutes protecting some function confided to national control, as the United States mail or interstate commerce, and often providing especially for injunction as a means of enforcing the law.

Two early cases in contempt seemed to lead the way for the later decisions. These are *In re Doolittle* and another, strikers,<sup>5</sup> and *United States v. Kane*.<sup>6</sup> In the former case, Doolittle and Schan-

<sup>1</sup> U. S. Stat. 1889, ch. 382, §§ 1, 5.

<sup>2</sup> U. S. Stat. 1890, ch. 647, § 4.

<sup>3</sup> U. S. Stat. 1894, ch. 349, § 74.

<sup>4</sup> *Kansas v. Tiebold*, 123 U. S. 623; *Eitenbecker v. Plymouth Co.*, 134 U. S. 31; *Carelton v. Rugg*, 149 Mass. 550; *State v. Sanders*, 66 N. H. 39; *Littleton v. Fritz*, 65 Iowa, 488; *State v. Fraser*, 48 N. W. Rep. (N. D.) 343; *State v. Crawford*, 28 Kans. 726.

<sup>5</sup> 23 Fed. Rep. 544 (1885).

<sup>6</sup> 23 Fed. Rep. 748 (1885).



backer, the defendants, were engaged in a "strike" against the Missouri Pacific Railroad, and sought to prevent the operation of that road. They in fact interfered with the handling of freight and taking out of an engine by the Wabash road, which was in the hands of a receiver appointed by the federal court. The marshal arrested them for such interference, and an order was made on them to show cause why they should not be punished for contempt of court. Mr. Justice Brewer, who has within a month past advocated the injunctive power in an after-dinner speech at Chicago, in which he compared the critics of government by injunction to the body of Lazarus after it had lain four days in the grave, and District Judge Treat held that in seeking to interfere with the property of the Pacific road the defendants were confederated for an unlawful purpose; and in carrying it out, if they exceeded their intent and interfered unintentionally with the property in the hands of the receiver of another road, they were liable, and they were accordingly sentenced each to the county jail for sixty days, Judge Treat desiring to inflict a still severer penalty.

In *United States v. Kane, supra*, where a combination of workmen with forms of request merely, but with a show of force which intimidated, induced the employees of a receiver of a railroad to abandon their duties, and thus prevented the receiver from operating the road, they were held guilty of contempt, and, according to the various measures of their guilt, they were: one discharged on his personal recognizance not to interfere with the management of the road by the receiver; one sentenced to the county jail for ten days, one for thirty days, and one for four months.

In 1891 the Circuit Court for the Southern District of Ohio held, in *Casey v. Cincinnati Typographical Union*,<sup>1</sup> that a combination or a conspiracy by a trades union to boycott a newspaper for refusing to unionize its office is illegal and unlawful, and will be enjoined by a court of equity. "Equity will enjoin the publication and circulation of posters, handbills, circulars, etc., printed and circulated in pursuance of such combination or conspiracy or boycott."

In *Coeur d'Alene Consolidated Mining Company v. Miners' Union of Wardner*,<sup>2</sup> it appeared that, April 29, 1892, about one hundred men, headed by defendant, John Tobin, went to complainant's mine, where affiants were at work, and forcibly ejected them therefrom, took them to the Miners' Union Hall at Burke, where,

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<sup>1</sup> 45 Fed. Rep. 135.

<sup>2</sup> 51 Fed. Rep. 260 (1892).

in the presence of a large number of men, it was demanded that they should join the union or leave the camp; that, upon their refusal to do either, it was ordered by the meeting that they be marched out of the State; that thereupon they were escorted in the direction of Thompson's Falls, Montana, by at least two hundred men, who beat oil-cans in imitation of drums; that they were called "scabs," and coarse indignities were heaped upon them; that in this manner they were driven from the State, denied the privilege of purchasing food, and for two days were without any, and exposed to the inclemency of the weather in crossing a snowy range into the State of Montana. On this showing defendants were ordered to refrain from entering on complainant's mines or from interfering with the working thereof, or by force, threats, or intimidation preventing complainant's employees from working upon its mines. District Judge Beaty, after a full hearing, continued the order.

In 1893, Judge Taft and District Judge Ricks decided Toledo, Ann Arbor, and Northern Michigan Railroad Co. *v.* Pennsylvania Railroad Co. *et al.*<sup>1</sup> The complainant company asked an injunction against eight railroad companies which threatened to refuse interstate freight from complainant on the ground that their own engineers were members of the Locomotive Engineers' Brotherhood, and would strike if they hauled freight for a road which employed engineers not of the brotherhood. An injunction was also prayed against P. M. Arthur, president of the brotherhood, to restrain him from requiring the members thereof to refuse to handle such freight. The court held it had jurisdiction to restrain violations of the Interstate Commerce Act which would result in irreparable injury, and had such jurisdiction without any regard to the citizenship of parties. That the facts showed a combination to violate the act, and that all participating were guilty of a criminal conspiracy. That the carrier against which the conspiracy was directed, if injured, had a cause of action against all engaged in it, and since the injury would be irreparable, might have a temporary injunction against it. That an injunction could be extended to the servants of a party enjoined. That persons in the employ of the defendant company, while they continued in such employ, must obey the injunction, but without contempt could avoid obedience by ceasing to be such employees, and that no court had ever com-

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<sup>1</sup> 54 Fed. Rep. 730-746.

pelled persons to continue the relation of servants. That Arthur would, by mandatory injunction, be compelled to rescind his unlawful order to the brotherhood if already given, especially if it would otherwise occasion flagrant violations of the order of injunction.

That an engineer (of a company enjoined from refusing to haul the cars of a boycotted line, of which injunction he had notice, though not a party to it) who, while on his run, refuses to attach such a car to his train, and declares that he quits his employment, but nevertheless remains with his engine at that point five hours, until he receives a telegram from his labor union to haul the car, and who thereafter continues in his employment, is guilty of contempt, although those engineers who in good faith quit their employment before starting on their run may not be in contempt, and the offending engineer, although he swore he did not know he was violating and that he did not intend to violate law, was accordingly fined fifty dollars and costs.

In 1894, Judge Jenkins of Wisconsin, of the United States Circuit Court, was applied to by Mr. Henry C. Payne and others, receivers of the Northern Pacific Railroad, on the ground that their employees were contemplating a strike for the purpose of preventing a proposed reduction of wages, and injunctions were asked against them and the heads of various labor organizations. A very comprehensive order was issued to the officers, agents, and employees of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employees of said receivers or not, and to all persons, generally restraining them from interfering with the property of said receivers or their operation of the road, and from "*combining and conspiring to quit, with or without notice, the service of said receivers with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers with or without notice as to cripple the property or to prevent or hinder the operation of said railroad.*"

The number of employees affected by this or kindred injunctions sought appears to have been about twelve thousand, scattered over a distance of four thousand four hundred miles, and application was made by persons enjoined for a modification of various provisions, and especially of that extracted above. The court, however, held that it had jurisdiction through the receivership; that a strike is a combination among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business



until compliance. The concerted cessation of work is but one of the least effective means to the end; the intimidation of others from engaging in the service, interference with and destruction by violence of property and resort to force being other means employed. Such a strike is unlawful, and a federal court having charge by its receivers of an interstate railroad was held to have jurisdiction to enjoin the executive heads of the various organizations of employees from ordering a strike upon the road, and therefore the judgment was modified merely in a few unguarded expressions, and in the main affirmed.<sup>1</sup>

The action of this court seemed to surprise our "kin beyond sea," and the "Law Times" of London<sup>2</sup> described it as showing "the tremendous powers of government and control over the lives and fortunes of American citizens which may be claimed and exercised;" and added, "It was really placing large masses of workmen engaged upon industrial undertakings under a slavery régime." The decision was appealed from and passed upon in the Circuit Court of Appeals in *Arthur v. Oakes*,<sup>3</sup> Mr. Justice Harlan writing the opinion. It was there held "that it would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed in such restraint is in a condition of involuntary servitude — a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. The rule, we think, is without exception that equity will not compel the actual affirmative performance by an employee of merely personal service, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him." That even if the quitting were in breach of contract, the injured party has merely his action for damages; but that equitable relief by injunction against the breach has always been regarded as impracticable. That the peaceful but concerted combination of workmen to withdraw from an employment on account of a reduction of wages, even if amounting to a strike, is not illegal."

The action of the lower court was reversed, and the case remanded with directions for a modification of the injunction accordingly.

In March, 1893, in the United States Circuit Court of Louisiana, in *United States v. Workingmen's Amalgamated Council of New*

<sup>1</sup> *Farmers' Loan & Trust Co. v. N. Pacific Railroad Co.*, 60 Fed. Rep. 803.

<sup>2</sup> 97 *Law Times*, 384, 385.

<sup>3</sup> 63 Fed. Rep. 310.

Orleans,<sup>1</sup> an injunction was issued against striking draymen who paralyzed the business of that city, on the theory that this was a conspiracy to interfere with interstate commerce which fell under the Anti-Trust Act. It was suggested by counsel in argument of the Debs case (*post*) that under the rule of this last decision a strike of the elevator boys in a hotel would, in like manner, fall under federal cognizance and be enjoined by the federal court as an interference with interstate commerce.

In the case of *Thomas v. Cin., N. O. & T. P. Ry. Co., In re Phalen*,<sup>2</sup> the United States Circuit Court (South. Dist. Ohio, 1894) held that Phalen had been engaged in an unlawful conspiracy with Mr. Debs and others to obstruct the operation of a railroad being managed by the receiver of said court. That such attempt, with the knowledge that the railroad was in the hands of the court, was a contempt. That the attempt being to paralyze interstate commerce and the transmission of the United States mails, was an offence against the Federal statute, though mere cessation of work was solicited, and Phalen was sentenced to six months imprisonment.

Within a few months thereafter (Dec. 14, 1894) the celebrated case of *United States v. Debs*<sup>3</sup> was decided by the United States Circuit Court for the Northern District of Illinois.

Mr. Debs was proceeded against for contempt in violating an injunction issued, on complaint of the United States, on petition of the receivers of the Atchison company. He, with others, officers of the American Railroad Union, was charged with an unlawful conspiracy, in connection with the great Pullman strikes, to interfere with the transportation of the mails and interstate commerce on the railroads named, and a writ of injunction was obtained to enjoin "them and all persons whomsoever" to desist therefrom. The injunction elaborately and in detail forbade various acts which might so operate. It was alleged that, thereafter, defendants sent hundreds of telegrams ordering the members of the union to strike. That violence, interference with, and destruction of the property and structures and operations of the railroads followed, and that defendants knew that violence invariably followed all strikes of similar character.

The opinion, by Circuit Judge Woods, held that the defendants were not entitled to be discharged upon their own sworn answers

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<sup>1</sup> 54 Fed. Rep. 994.

<sup>2</sup> 62 Fed. Rep. 803.

<sup>3</sup> 64 Fed. Rep. 724.

denying their guilt, even in case of a stranger to the bill for the injunction.

That the so-called Federal Anti-Trust Act of July 2, 1890, declaring illegal every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the States or with foreign nations, is not aimed at capital only, but any such restraint to be accomplished by conspiracy is unlawful. That the power given courts of equity, by said act, to prevent and restrain violations of the act, is not an invasion of the right of trial by jury. That the defendants were guilty of contempt as charged, and they were sentenced to terms of from three to six months. Application was made to the Supreme Court of the United States for a writ of error, but it was denied without an opinion.<sup>1</sup> But a writ of *habeas corpus* was sued out in the Supreme Court, and decided May 25, 1895.<sup>2</sup>

The court held, Mr. Justice Brewer delivering the opinion, that the Federal government, under its powers, could remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mails. That it was competent to intervene to remove or prevent the same by the injunctive power of the civil courts, even although the obstructors might also be liable in the criminal courts. That the injunction might be enforced by proceedings in contempt, and that such proceedings are not in execution of the criminal laws of the land. That the Circuit Court had power to issue its process of injunction and to inquire whether its orders had been disobeyed, and under the statute to punish for contempt in case such disobedience were found. That its findings of the fact of disobedience are not open to review on *habeas corpus* in this or any other court. Justice Brewer speaking, after dinner, at the Marquette Club, Chicago, Feb. 12, 1898, named Judge Woods as the hero of that struggle for the domination of law, whose name will be revered and honored through the coming ages.

In connection with the disturbances in the Pullman strike mentioned above, *United States v. Agler*<sup>3</sup> was decided in 1894 by the United States Circuit Court for the District of Indiana, expressly holding that where an injunction had been issued against Debs and others, it became binding as against one not named in the bill and not served with subpœna, when the injunction order is served on

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<sup>1</sup> 15 Sup. Ct. Rep. 1039.

<sup>2</sup> *In re Debs*, 158 U. S. 564.

<sup>3</sup> 62 Fed. Rep. 824.



him as one of the unknown defendants referred to in the bill. Says District Judge Baker: "I think an injunction that is issued against one man, enjoining or restraining him, and all that give aid or comfort to him, or all that aid or abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed. I do not entertain any doubt about that."

And a like doctrine is maintained in the kindred case of *United States v. Elliott et al.*,<sup>1</sup> by the Circuit Court of the United States for the Eastern District of Missouri, 1894. District Judge Phillips finds it a case for the strong arm of equity, since "such law-breakers are generally a lot of professional agitators. Their tongues are their principal stock in trade, and inasmuch as imprisonment for debt is abolished, and cruel and unusual punishments are prohibited, an execution would be quite unavailing."

In *Elden v. Whitesides*,<sup>2</sup> the United States Circuit Court, Eastern District of Louisiana, in 1895, at the suit of citizens of Liverpool, England, enjoined defendants from conspiring to prevent the loading or unloading of plaintiff's steamships except by defendants or their confederates, holding the fact that some of the acts enjoined were crimes would not prevent equity from thus intervening to prevent irreparable injury to property rights. On like grounds in *Hamilton Brown Shoe Co. v. Saxey* the Supreme Court of Missouri approve the enjoining unlawful acts which were intended to force men to quit plaintiff's employment.<sup>3</sup>

And the Supreme Court of Illinois, in *Barrett v. Mt. Greenwood Cem. Ass.*,<sup>4</sup> held that the pollution of a stream to the irreparable injury of the persons or property of others would be enjoined notwithstanding it was a crime by statute.

And in *Davis v. Zimmerman*<sup>5</sup> it was held that the lawful business of a man is his property, and a conspiracy to destroy or injure it will be enjoined even though the acts enjoined are criminal.

Like decisions have been made in *Consolidated Steel and Iron Company v. Murray*,<sup>6</sup> *Vegelahn v. Guntner*.<sup>7</sup>

The latter case, decided Oct. 27, 1896, holds that the maintenance of a patrol of two men in front of plaintiff's premises in furtherance of a conspiracy to prevent, whether by threats, intimidation, or by persuasion, any workman from entering into or con-

<sup>1</sup> 64 Fed. Rep. 27.

<sup>2</sup> 72 Fed. Rep. 724.

<sup>3</sup> *Hamilton Brown Shoe Co. v. Saxey*, 32 S. W. Rep. 1106, 131 Mo. 212.

<sup>4</sup> 42 N. E. Rep. 891, 159 Ills. 385.

<sup>5</sup> 36 N. Y. Supp. 303, 91 Hun, 489.

<sup>6</sup> 80 Fed. Rep. 811.

<sup>7</sup> 44 N. E. Rep. 1077, 167 Mass. 92, 35 L. R. A. 722.

tinuing in his employment, will be enjoined though such workmen are not under contract to work for plaintiff. (To this Field, C. J., and Holmes, J., enter a powerful dissent.)

The court further holds that a continuing injury to property or business may be enjoined though it be also punishable as a crime. Mr. Justice Holmes, dissenting, says (at p. 1081): "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of the advantages which they otherwise lawfully control." "I can remember," he continues, "when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business."

United States Circuit Judge Caldwell, Nov. 8, 1897, in a dissenting opinion in *Hopkins v. Oxley Stone Co.*,<sup>1</sup> largely quotes from and agrees with Judge Holmes's opinion.

In *Nashville, Chattanooga, & St. L. Ry. Co. v. McConnell et al.*,<sup>2</sup> the United States circuit judge for the Middle District of Tennessee, Aug. 19, 1897, enjoined ticket brokers from buying up and reselling round-trip tickets sold by the railroad at special rates on account of the Nashville Exposition, but by their terms not transferable, holding that it was not a fatal objection that the use of the writ was novel nor that the acts enjoined were criminal, but that a continuing interference with the business and contracts of the plaintiff, where the injury was irreparable, and the only remedy at law

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<sup>1</sup> 83 Fed. Rep. 912, see p. 931.

<sup>2</sup> 82 Fed. Rep. 65.

was by a multiplicity of suits for damages, was ground for an injunction; and that various brokers dealing with the same class of tickets might all be joined as defendants in one suit.

In the very late case of *Mackall v. Ratchford*,<sup>1</sup> decided Aug. 21, 1897, two days later than the last, in the United States Circuit Court for the Western District of Virginia, an injunction had issued and been served restraining defendants and all others from interfering with the operation of certain mines, and from interfering with the employees thereof in going to and from their work. The defendants joined a body of over two hundred striking miners who marched, with music and banners, past one of said mines and the homes of the miners working therein, marching and countermarching for three days along the public highway between the mines and the home of the miners, halting in front of the mine and taking positions on each side of the road, which the miners must cross in going to and from the mine before daylight and late at night, at the time such miners were going to and from their work. The avowed object of the strikers was to influence the miners to join in the strike; and this marching and halting in front of the mine were with the evident intent to accomplish this object by intimidation, and some of the miners were thereby intimidated and kept away from their work. It was held that defendants were guilty of contempt. The court found the accused knew of the injunction. That the crowd said, "We are used to papers like that," and "I will eat mine for breakfast." The officers warned and besought them not to violate it, but in vain. That outside of their so marching the conduct of the crowd was most commendable, sober, and decent. That they indulged in no threats, or loud, boisterous, or taunting language. The accused had already been in custody three days. They honestly believed they were within their rights so long as they kept within the highway. Therefore their further punishment was limited to three days' confinement in the county jail.

The convenience and efficacy of the rules which seem to be quite generally maintained by these cases for protecting the rights of plaintiffs adequately and promptly can hardly be questioned. But there are others to be considered besides the corporations and employers who either individually, or in the name of the government, are commonly complainants. Rules for the protection of

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<sup>1</sup> 82 Fed. Rep. 41.



one class of rights are, to quote the expression of Von Ihering in his "Struggle for Law," "Janus-faced," presenting a beneficent aspect to one class and an entirely different aspect to another class.

We find ourselves confronted, as Mr. Dunbar points out in the article mentioned *supra*,<sup>1</sup> with "the proposition that a court of equity may *ex parte*, upon the motion of the plaintiff, issue an order restraining all persons from doing specific acts, although such persons are not parties to the cause, and in no way connected with the parties, are not identified in any way, and cannot be identified except by the fact of their violating the injunction." And he says this cannot be distinguished from criminal legislation. He points out<sup>2</sup> that the sole reason for preferring this remedy is that in other forms of procedure "those safeguards which have been thought essential to individual liberty" interpose some delay or uncertainty. The protests against the doing away those safeguards have been numerous and worthy of consideration.

Thus F. J. Stimson, Esq., of Boston, has pointed out<sup>3</sup> that in proceedings for contempt punishment is inflicted without indictment, right of counsel, without being confronted with the witnesses, without trial by jury or sentence according to uniform statute, but at the discretion of the judge. We have seen, as held by the Supreme Court,<sup>4</sup> that the findings of the judge as to the facts cannot be reviewed or examined, however erroneous, and this often in matters where his personal feeling is most deeply involved, since it is apt to be the enforcement of his own injunction. There is no appeal or writ of error, and on *habeas corpus* or writ of prohibition or like proceedings commonly nothing but the jurisdiction can be examined, error or abuse of power may go any length unchecked, if it does not exceed jurisdiction. *Ex parte* Lennon<sup>5</sup> illustrates the difficulty and almost impossibility of obtaining a review of these injunctive orders on any ground except the jurisdiction, as does the decision *supra*.<sup>6</sup>

The late Richard C. McMurtie, Esq., attacks the practice<sup>7</sup> above indicated on the ground of "the value of the rule that removes criminal jurisprudence from even the appearance of caprice of the judiciary, and compels the intervention of a public trial with the

<sup>1</sup> At p. 364.

<sup>2</sup> In vol. 10 Pol. Science Quart. p. 190.

<sup>3</sup> 150 U. S. 393, 14 S. C. R. 123.

<sup>4</sup> 31 Am. L. Reg. (N. S.), at page 2.

<sup>5</sup> Page 320.

<sup>6</sup> *In re* Debs, *supra*.

<sup>7</sup> *In re* Debs.

witnesses brought face to face, a jury to determine the facts, the public discussion of the admissibility and effect of evidence and a fixed standard of punishment, with a right to a review and to an appeal to the pardoning power." He points out that no trace of the proofs taken may be left on which a defendant is incarcerated, as it may be all unwritten testimony, taken "*ex parte* without the accused seeing the witnesses or having an opportunity to ask them a single question," or the proofs may be "by affidavits."

William Draper Lewis, Esq., the learned editor of Blackstone's Commentaries, and now Dean of the Law School of Pennsylvania University, also printed an article<sup>1</sup> entitled "A Protest against administering Criminal Law by Injunction."

The "American Law Register" in editorial notes has criticised the doctrines, and among other things observed: "The Star Chamber, which has been aptly described as a court of 'Criminal Equity,' spent its time in issuing orders to persons forbidding them to commit crime. The popular feeling against the court was based not so much on the fact that many new-fangled crimes were invented, as on the objection 'to the summary manner in which those charged with contempt of the court's orders were convicted.'" <sup>2</sup>

Charles Claflin Allen, Esq., of St. Louis, presented a paper before the American Bar Association under title "Injunction and Organized Labor," in August, 1894,<sup>3</sup> in which the authorities up to that date were most laboriously collected and reviewed and the dangers of the practice earnestly discussed.

Nor have the courts uniformly acquiesced in the doctrines indicated in the decisions reviewed above.<sup>4</sup>

So it is held a trade union against whose members plaintiff discriminates in employing labor will not be enjoined from sending circulars to plaintiff's customers to induce them to withdraw their custom from plaintiff as long as such discrimination continues, when defendants are not guilty of any violence or injury to property or intimidation.<sup>5</sup> And the Court of Appeals of New York, in *Reynolds v. Everitt*,<sup>6</sup> held, Dec. 18, 1894, that "an employer is not entitled

<sup>1</sup> 33 Law Reg. and Rev. 882.

<sup>2</sup> 31 Am. L. R. p. 785.

<sup>3</sup> Reports of Am. Bar Assoc. vol. 17, p. 299.

<sup>4</sup> See *Worthington v. Warring*, 36 Cent. L. J. p. 170, March 3, 1893; *Mogul St. Ship Co. v. McGregor*, 15 Q. B. Div. 476; *Johnston Harvester Co. v. Meinhart*, 9 Abb. N. C. 393.

<sup>5</sup> *Sinsheimer v. United Garment Workers of America*, 28 N. Y. S. 321, reversing same case, 26 N. Y. Supp. 152.

<sup>6</sup> 39 N. E. Rep. 72, 144 N. Y. 189.

to an injunction against striking employees for inducing others by entreaty or persuasion to leave his employment, where no intimidation is used." Circuit Judge Putnam, in *United States v. Patterson*,<sup>1</sup> held that the anti-trust law was not intended to and did not authorize the federal courts to intervene in cases of strikes and boycotts affecting interstate commerce.

In 1893 the case of *Bohn Manufacturing Co. v. Hollis*<sup>2</sup> was decided, which held (I give the syllabus): "Any man (unless under contract obligation or unless his employment charges him with some public duty) has a right to refuse to work for or deal with any man or class of men, as he sees fit, and this right which one man may exercise singly any number may exercise jointly.

"2. A large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association. Held, not actionable and no ground for an injunction."

And in 1895, in the Circuit Court of the United States, N. D. California, the case of *Continental Insurance Company v. Fire Underwriters*<sup>3</sup> held, "An association of fire underwriters formed under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents, and non-intercourse with companies not members, is not an illegal conspiracy, and the accomplishment of its purpose by lawful means will not be enjoined at the instance of a company not a member of the association." Each of these cases extensively reviews the earlier English and American cases, and each relies largely on the famous English precedent already referred to, *Mogul Steamship Co. v. McGregor*,<sup>4</sup> in which a decision by Lord Chief Justice Coleridge was affirmed by the Court of Appeals (Q. B. Div.) and by the House of Lords, which upheld the right of an associate body of shipowners, trading between China and London,

<sup>1</sup> 55 Fed. Rep. 605.

<sup>2</sup> 55 N. W. Rep. 1119, 54 Minn. 223.

<sup>3</sup> 67 Fed. Rep. 310.

<sup>4</sup> 15 Q. B. 476, 21 Q. B. 544, 23 Q. B. 598 (1892), L. R. App. Cas. 25.



who sought to keep up the rate of freights and to monopolize the carrying trade. They issued a circular offering a rebate to shippers who dealt with them exclusively and who would not deal with the plaintiffs. They also combined and offered to carry freight at losing figures in order to frighten plaintiff from the field. This was held not to be an unlawful conspiracy, even though the intent might be to ruin competitors. "They have a right to push their lawful trade by all lawful means," said the Lord Chief Justice, "and to give benefits to those who deal with them exclusively." And Lord Justice Bowen observed, "If peaceable, honest combinations of capital for purposes of trade competition are to be struck at, it must be by legislation, for I do not see that they are under the ban of the common law." The opinion in the last above federal decision cites numerous American cases supporting this English decision.

It is the contention of those near to the labor organizations that these cases establish the legality of combinations of capitalists, even of moderate or small capitalists and business men, as retail lumber dealers and insurance agents, for the purpose, by non-intercourse and by at least partial boycott, of disciplining those who do not join their combination or do not transact business as they wish it to be done, but that the courts hold an exactly opposite rule when they pass upon the peaceful combinations of humbler laboring men to maintain wage rates, and to declare for non-intercourse with those who will not join them or who oppose them. It is difficult to see why the rules should not be identical, and, if the courts have appeared to discriminate against those who most need to be taught the impartiality of our administration of justice, it is hoped that later decisions may so plainly establish that "he who runs may read," that there is one rule for all alike.

It is fair to say that these decisions were considered, and sought to be discriminated or limited, in a late federal decision; but not so successfully as to satisfy Mr. Circuit Judge Caldwell, as appears in his dissenting opinion.

The case alluded to is the last important decision which has been observed on this subject, *Hopkins v. Oxley Stave Co.*,<sup>1</sup> in which Judges Sanborn and Thayer upheld an injunction against certain members of a coopers' union which sought to boycott the barrels of the complainant and all provisions packed in them, the

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<sup>1</sup> 83 Fed. Rep. 912 (Nov. 8, 1897).

ground of the boycott being that they were hooped by machinery, operated by child labor, which displaced more than one hundred coopers, many of them old and unable to obtain other employment. Circuit Judge Caldwell filed a dissenting opinion, in which he pointed out that the only ground for equity assuming jurisdiction was that the defendants were "persons of small means," and held that as the combination was not accompanied by violence or threats, it was not unlawful and ought not to be enjoined. He says: "Courts of equity have no jurisdiction to enforce the criminal laws. It is very certain that a federal court of chancery cannot exercise the police powers of the State of Kansas, and take upon itself either to enjoin or to punish the violation of the criminal laws of that State. It is said by those who defend the assumption of this jurisdiction by the federal courts, that it is a swifter and speedier mode of dealing with those who violate or threaten to violate the laws than by the prescribed and customary method of proceeding in courts of law; that it is a 'short cut' to the accomplishment of the desired object; that it avoids the delay and uncertainty incident to a jury trial; occasions less expense and insures a speedier punishment. All this may be conceded to be true. But the logical difficulty with this reasoning is that it confers jurisdiction on the mob equally with the Chancellor. Those who justify or excuse mob law do it upon the ground that the administration of criminal justice is slow and expensive, and the results sometimes unsatisfactory. It can make little difference to the victims of short-cut and unconstitutional methods whether it is the mob or the Chancellor that deprives them of their constitutional rights." He continues: "In that masterly statement of the grievances of our forefathers against the government of King George, and which they esteemed sufficient to justify armed revolution, are these: 'He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws,' and 'for depriving us in many cases of the benefit of trial by jury.'" He points out that the provisions of our Constitution were adopted by a people smarting under these wrongs, to prevent their repetition, and that the provisions are "not obsolete, and are not to be nullified by mustering against them a little horde of equity maxims and obsolete precedents originated in a monarchical government having no written constitution." He says: "It is competent for the people of this country to abolish trial by jury and confer the entire police powers of the State and nation on

federal judges, to be administered through the agency of injunctions and punishment for contempt; but the power to do this resides with the whole people, and it is to be exercised in the mode provided by the Constitution. It cannot be done by the insidious encroachments of any department of government."

That there has been a serious modification of the received conception of the scope of injunction within the past few years is suggested by the fact that Mr. High, in his well-known work on Injunctions,<sup>1</sup> cites the *Atty.-Genl. v. R. R. Co.*<sup>2</sup> (the Potter Law Case), where the railways were enjoined from violating a statute as to their rates for transportation as "the only precedent for the interference of equity to enforce by injunction obedience to a penal statute," and adds, "It certainly extends the jurisdiction by injunction to a point unsustained by principle and upon authority."

That case rests upon the special ground of the right of equity at the suit of the Attorney-General to restrain a corporation in matters *publici juris* from excess or abuse of corporate franchise or violation of public law to the public detriment.

The power of the court to punish for contempt cannot be taken away, or courts would become "mere debating societies," as has been well said, but it may be defined and regulated by statute. "It is and must be a power arbitrary in its nature and summary in its execution. It is perhaps nearest akin to despotic power of any power existing under our form of government."<sup>3</sup>

That case well illustrates the importance of supervision in proceedings for contempt. Hon. W. F. Bailey, Circuit Judge for Eau Claire County, was a candidate for re-election. He was criticised by a member of the bar in a newspaper of the county. His court was in session. He caused proceedings in contempt to be brought against the member of the bar and the editor of the paper. They in their affidavits alleged the truth of their charges, and while the matter was pending an alternative writ of prohibition was obtained from the Supreme Court of the State and served on Judge Bailey. He announced that he would proceed no further in the pending proceedings, but at once made an order adjudging both defendants guilty of a new contempt in the immediate presence of the court, and sentenced each to jail for thirty days. The Supreme Court, resting on the statutory definitions of contempt, holds that the acts

<sup>1</sup> Third edition, 1890, note, p. 21.

<sup>2</sup> 35 Wis. 424.

<sup>3</sup> State *ex rel. Atty.-Gen. v. Cir. Ct. Eau Claire Co.* (Wisconsin, 1897), 72 N. W. Rep. 194.



complained of were not a contempt in Wisconsin, although they might be at common law, and that therefore the lower court had no jurisdiction; and that a defendant can properly allege the facts which establish a valid defence, and cannot be held to be guilty of a contempt on account of such necessary allegations.

It is difficult to see how the court could have reached this salutary result without the aid of statute, however.

The statutes of Wisconsin,<sup>1</sup> and it is believed of most of our States, define contempts, provide for the trial of those charged therewith, and greatly limit the punishment (in Wisconsin not to exceed thirty days in county jail and \$250 fine).

In the absence of statute, the power of the judge appears to be unlimited. An anonymous writer in the "Law Times" (London),<sup>2</sup> points out the unrestrained power of the Chancellor in these respects. He quotes Sir Erskine May as to Lord St. Leonard's communication concerning the hardships upon prisoners for contempt, and mentions the case of one who died in prison after a confinement of more than fifty years. He quotes Hallam's "Constitutional History" to the effect that in the punishment for contempt by the House of Lords, as far as precedent is concerned, "there seems nothing (decency and discretion excepted) to prevent their repeating the sentences of James I.'s reign, — whipping, branding, hard labor for life. Nay, they might order the Usher of the Black Rod to take a man from their bar and hang him up in the lobby;" and the writer continues, "The House of Lords and the Court of Chancery possess, in their powers of committing for contempt, a power which may be as truly described as tyrannous — which is the word Hallam uses — as the power of arrest on suspicion till recently exercised by the *procureur de la République* and *Juge d'Instruction* in France."

Revised Statutes U. S. at section 725 gave the Federal, District, and Circuit Courts, which of course have none but statutory powers, the right to punish contempts by fine or imprisonment at the discretion of the court. But this anomaly of absolute and unrevised power in respect to fine and imprisonment in a court, or single judge at chambers, as in bankruptcy (and that there may still be contempts in bankruptcy, see *Owen v. Potter*<sup>3</sup>), has not escaped the attention of our federal Congress. A bill passed the Senate June 10, 1896,<sup>4</sup>

<sup>1</sup> R. S. Wis. §§ 2565-2570.

<sup>2</sup> Jan. 22, 1898 (vol. 104, pp. 278, 279).

<sup>3</sup> Mich., Jan. 25, 1898, 73 N. W. Rep. 977. <sup>4</sup> See 30 Chicago L. News, p. 46.

reported by Senator Hill from the Judiciary Committee, to divide all contempts of court into direct and indirect, to allow summary judgment in the former, but requiring a record of the judgment and proceedings and providing for the filing of a written statement of accusation in all indirect contempts, and that the accused be required by an order fixing the time to answer. That trial shall proceed on testimony *produced as in criminal cases, that the accused shall be confronted by the witnesses, and on demand must be tried by a jury.* That a bill of exceptions may be had and the proceedings be reviewed on direct appeal or writ of error.

This bill went to the House of Representatives and was referred to the Judiciary Committee, and with great modifications, by which specific questions only might be submitted to the jury, but the court must on the answers of the jury determine the question guilty *vel non*, was reported by the majority of that committee.<sup>1</sup>

This substitute was submitted to and approved by the representatives of five of the principal labor organizations of the country. A minority of four of the House Judiciary Committee favored the passage of the Senate bill, and denounced the substitute as an attempt to give only a pretence of a jury trial in such cases.

The Hon. David B. Henderson, chairman of such committee, under date of Jan. 17, 1898, writes me that the bill was not reached for consideration in the last Congress, and that a bill similar to the House substitute was offered in the present Congress Dec. 15, 1897, by Mr. Sulzer, which, I understand, is undisposed of. It is hoped that some adequate and reasonable measure may be enacted by which at least a review, upon the merits, of proceedings so deeply affecting the liberty of citizens may be had, and that at least as efficient safeguards may surround the person as are provided for property rights. It is not especially pleasant to reflect that each of us enjoys his right of liberty on sufferance, subject to the caprice of any judge or court commissioner of the jurisdiction, and that in case of capricious wrong it would be a happy accident if he could get the matter before the superior courts in such a manner as to permit them to correct injustice; yet that seems hardly a misstatement of the present condition of the law, except as statutes have modified it.

It is well that the administration of justice should not only be conducted, but should be obviously controlled, by definite law. The

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<sup>1</sup> Report No. 2471, 54 Cong. Sub. 11.

principle of the Massachusetts Bill of Rights, which at every reading so deeply moved Mr. Rufus Choate, that this is a government of laws and not of men, ought not to appear to be forgotten. It must be remembered that the habitual participation of laymen in the administration of justice as triers of the fact greatly reconciles the body of the people to the decision of controversy by legal proceedings. The Three Tailors of Tooley Street thus participate and approve, and their approval is valuable.

The late Lord Chief Justice Coleridge said that he always had a doubt as to whether the world would have been harmed if all the cases in, I think it was, Barnewall and Adolphus' Reports had been decided the other way; but it is suggested that if the English people had felt that those cases were wrongly decided, there would have been serious harm. The satisfaction of the people with the machinery for administering justice is of prime importance. The disposition of the judges, which is a part of their human nature, to construe power into their own hands, is met by a kindred and equal desire in the laymen to keep their share in affairs. The strain put upon the courts, especially in meeting the difficulties which have been met, and I will not say ill met, by injunctions in the cases considered, is very great. The State has been called "a corporation armed for the preservation of peace," and it has been able by this device to show an efficiency for that purpose which has surprised all and delighted many. The present Chief Justice of the United States, before he became the head of the bench, remarked of a reforming member of the Chicago bar, "Brother B. would codify all laws in an act of two sections: 1st, All people must be good; 2d, Courts of equity are hereby given full power and authority to enforce the provisions of this act." It may be mentioned that this witticism was quoted in the brief of counsel for Mr. Debs, but without naming its author, in the argument of the *habeas corpus* before the United States Supreme Court.

It is submitted that the pleasantries of the Chief Justice hardly goes beyond the powers which the courts of equity have within the past eight years evolved and, on the whole, not unwisely exercised, yet it would strengthen their hold on all just powers and add a needed safeguard for the citizen, if the rights of one accused of contempt were protected by statutory enactment as to the method of trial and the sentence which might be inflicted, and if a proper review of unjust and unwise action by the court or judge imposing punishment for contempt were provided.



It would seem as if the government of this vast new territory, which equity has successfully taken possession of, should be provided for by adequate legislation, and, without saying that gross wrongs have been done, that "the door should be locked before the horse is stolen."

Already many courts deny the right of the legislature to even regulate their proceedings in contempt cases,<sup>1</sup> although others, including the Supreme Court of Wisconsin, freely admit this power.

Under the name of constructive contempts the way seems open, except as statutes and the good sense and good character of our judges prevent, for as serious an invasion of right as obtained in England under the name of constructive treason, so carefully guarded against in our Constitution.

In the meantime, however, it is right to note that a careful examination of the American Digests for the past eight years shows no undue growth of the use of injunctions and proceedings for contempt, since the titles under the head of injunction number in 1890 228, and in 1897 277; covering in 1890 14½ pages, and in 1897 17½ pages; and under the head "contempt" numbered 74 titles in 1890 and 80 titles in 1897, covering four pages in the former and four and a half in the latter year.

Gunpowder had not altered the art of war when Machiavelli wrote, although it had then been known in Europe for about two hundred years, nor has government by injunction yet seriously modified the practice of law. That there were great potentialities in gunpowder must be admitted, and its far-reaching effects on war and on civilization have been proved. I am not sure but that great potentialities yet rest in the use of the injunction in the manner established within the past few years. I only hope that both Bench and Bar, and legislative bodies as well, may use and develop them wisely, justly, and for the good of all, and especially may content a great people with the sense of that noble possession which Jefferson promised in his inaugural address, "Equal and exact justice to all men of whatever state of persuasion."

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<sup>1</sup> See *Hale v. State* (Ohio, 1896), 45 N. E. Rep. 199; *Rapalje on Contempt*, § 11.

## INSURANCE OF LIMITED INTERESTS AGAINST FIRE.

SEVERAL distinct classes of cases of fire insurance on property in which the insured has a limited interest, or an interest less than that of full ownership, have been the occasion of difficulty in determining the amount of recovery under the policy in case of loss; and the purpose of this article is to bring these classes of cases into relation with each other in the hope that some general rule may be found to exist which will either make more satisfactory the conclusions which the courts have reached, or lead to a correction of such results should they be found not to be in harmony.

It may be premised that the difficulty to be overcome in each of these cases is that of applying a general principle which has been assumed in the development of the law of insurance to the effect that insurance is a contract of indemnity. The question is not as to the correctness or value of this general proposition, but rather as to its meaning, and as to whether it applies only in determining what contract of insurance is valid, or whether it is also to control in determining what loss shall be recovered.

The contract of insurance is in its very essence aleatory, in that it involves an element of chance or risk. At a time when wagering contracts were not invalid the contract of insurance entered into by the owner of property was spoken of as a contract for an indemnity as distinguished from a wagering contract, because the general object of the contract was to provide indemnity for a loss rather than to secure the possibility of a mere speculative gain.<sup>1</sup> Before the passage of the statute 19 Geo. II., c. 37

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<sup>1</sup> See *Lowry v. Bourdieu*, 2 Doug. 468 (1780), where Lord Mansfield says: "There are two sorts of policies of insurance, mercantile and gaming policies. The first sort are contracts of indemnity and of indemnity only, and from that practice a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard, like the case of a die." The case was one in which plaintiff sought to recover a premium paid on a policy upon a vessel, the real occasion, however, of taking it being that the captain of the vessel was indebted to the plaintiff, who sought thus to have security for his claim. The majority of the court thought that the contract was in violation of the statute against gaming policies, and the plaintiff ought not to have relief although the insurance was void.

(1746), prohibiting wager policies, it had been usual to stipulate for insurance "interest or no interest," and the courts had no difficulty in allowing recovery in the event of loss, even though the assured was not at all concerned in point of interest in the subject-matter of the insurance.<sup>1</sup> Even after the statute such a policy was good on foreign ships.<sup>2</sup> But before the passage of the statute of Geo. II., some English courts, especially the Court of Chancery, had announced the view that insurance without interest was invalid.<sup>3</sup> In this country the courts were at first in some doubt as to whether they would recognize a wager policy as valid.<sup>4</sup> But it has become well established that even a valued policy is not valid if the insured has no interest.

The cases thus far referred to are cases of marine insurance in which the policy is valued, and therefore the discussion of indemnity had no relation to the amount to be paid, but only to the validity of the contract, depending on whether the insured had an interest. But even under a valued policy of marine insurance the question would arise as to the amount to be paid, in case of partial loss, and in this connection again it was said that such a policy was one of indemnity, and the insured could recover only *pro rata*. But this conclusion was put on the ground that otherwise the parties would be controverting the policy of the statute of Geo. II. prohibiting wager policies.<sup>5</sup>

<sup>1</sup> *Assievido v. Cambridge*, 10 Mod. 77 (1712).

<sup>2</sup> *Thellusson v. Fletcher*, 1 Doug. 315 (1780).

<sup>3</sup> *Godard v. Garrett*, 2 Vern. 269 (1692); *Harman v. Van Hatton*, id. 717 (1716). It is to be noticed that these were cases involving policies in favor of lenders on bottomry. In the first case the bond had become absolute, and the policy was cancelled by the chancellor at the suit of the insurer on the ground that the insured had elected to rely on the vessel, and was not entitled to his policy although the time of the policy had not expired. In the second case the borrower on bottomry asked to have the bond cancelled because the lender had recovered insurance, but this was not allowed.

<sup>4</sup> *Pritchett v. Insurance Co. of N. Am.*, 3 Yeates, 458 (1803); *Clendinning v. Church*, 3 Caines, 141 (1805); *Juheld v. Church*, 2 Johns. Cas. 333; *Buchanan v. Ocean Ins. Co.*, 6 Cow. 319 (1826).

<sup>5</sup> *Lewis v. Rucker*, 2 Burr. 1167 (1761). See also 1 Marshall, Ins. 99, 111. Prior to the statute of Geo. II. the Court of Chancery had compelled the insured in a marine policy to disclose what goods had been put on board and what saved, to determine how much the insurer must pay. *Le Pyre v. Farr*, 2 Vern. 716. And in the same line is the suggestion made in *Clendinning v. Church*, 3 Caines, 141, based on some of the English cases, that under a wager policy there should not be a recovery in case of a capture which did not result in loss (for instance, because of a recapture and restoration of the vessel), although capture was within the stipulations of the policy. But in *Depaba v. Ludlow*, Com. 360 (1720), insured was allowed to recover under his policy "interest or no interest, against all enemies, pirates," etc., on account of capture by a



The sense in which insurance was first said to be a contract of indemnity is illustrated by the difficulty with which the courts were confronted in regard to life insurance. At first there seems to have been no distinction taken between an insurance on the life of an individual and insurance on a vessel or goods at sea, and so long as the courts would enforce a wagering contract of insurance, that is, a contract in behalf of one having no interest, there seemed no necessity for making any such distinction. There was no essential reason why persons should not bet on the continuance of a life as well as upon the continuance of the existence of a chattel.<sup>1</sup> But in the famous case of *Godsall v. Boldero*,<sup>2</sup> in the King's Bench, which seems to have been the first case in which the question was definitely considered, Lord Ellenborough announced the doctrine that life insurance was to be looked on as a contract of indemnity, and refused to allow recovery under a policy to one who had taken insurance as creditor, but whose claim had been satisfied before the death of the party whose life was insured. He based this conclusion upon language of Lord Mansfield in regard to partial loss in marine insurance, and stated the broad doctrine that life insurance as well as every other form of insurance is a contract of indemnity as distinct from a contract of gaming or wagering. It was nearly fifty years afterward that Baron Parke in the Exchequer Chamber, in the case of *Dalby v. India & London Life Assur. Co.*,<sup>3</sup> overthrew the theory that life insurance was a contract of indemnity, and pointed out that it was simply a contract to pay a fixed sum of money on the happening of an event certain to occur but uncertain as to time. In that case the distinction

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pirate, although the vessel was retaken after nine days' detention, and was surrendered to insured after suit was brought.

<sup>1</sup> In Viner's Abridgment, under the head of Policy of Insurance, it is said in a note, "Assurances may be made on men's heads as well as ships and goods." And so in *Bendir v. Oyle*, Sty. 166 (1649), and *Denoir v. Oyle*, id. 172 (1649), the question is discussed as to whether the court of the Commissioners of Policy of Assurance could proceed in the trial of the assurance of a man's life, it being insisted that an action of that kind was triable at the common law, and was not by statute brought within the jurisdiction of the special court. The common-law court granted the prohibition, Roll. Chief Justice, answering the argument that the policy was like an ordinary policy of marine insurance, and that the life to be insured might concern merchandising, with a suggestion that "this is a far-fetched construction, and we cannot avoid the granting of the prohibition." It appears from the further statement of the case that the policy was taken on the life of one Captain Parr by persons who had become his bail for a debt in the admiralty court, Parr being part owner of a ship in which he was to make a voyage.

<sup>2</sup> 9 East, 72 (1807).

<sup>3</sup> 15 C. B. 365 (1854).

between fire and marine insurance as involving the necessity of indemnity, and life insurance as not a contract of indemnity, was clearly pointed out. The act of 14 Geo. III., c. 48, forbade life insurance without interest, and limited the amount to the interest; but the court construed this act as applicable only to the inception of the contract and as determining its validity when made, and not as limiting the recovery under a policy which was valid in its inception. This is the rule now universally recognized.<sup>1</sup>

Early fire-insurance cases indicate that the contract is understood to be one of indemnity to the owner of the property, and therefore that if the interest of the insured in the property has ceased he cannot recover for a loss, although within the time covered by the terms of the contract. In the report of *Lynch v. Dalzel*, in the House of Lords,<sup>2</sup> it appears that the insurers urged by way of defence that not only the express words, but the nature and design of the contract, is to limit the recovery to such loss as should be sustained by the insured only, but the decision was simply that after the termination of the insurable interest there could be no recovery. And so in *Sadlers' Co. v. Badcock*,<sup>3</sup> the Lord Chancellor refused a recovery under a policy of fire insurance in behalf of the assignees of the insured, the interest of insured having terminated before the loss. Though both of these cases might be referred to as holding that fire insurance is a contract of indemnity, neither of them decides that indemnity is to be measured by the injury to the person insured.<sup>4</sup>

Although these illustrations indicate that a description of insurance as a contract of indemnity did not mean all that such a statement has, in the later development of the law, been supposed to mean, yet they may perhaps be considered as indicating a general conception of the obligation of the insurer, limiting it in practice, so far as consistent with the express language employed, to an obligation to make good the loss suffered by the insured through

<sup>1</sup> *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Corson's Appeal*, 113 Pa. St. 438.

<sup>2</sup> 3 Brown, P. C. 497 (1729).

<sup>3</sup> 2 Atkyns, 554 (1743).

<sup>4</sup> The same suggestion as is made with reference to the cases last above referred to is applicable to *Wilson v. Hill*, 3 Met. 66, where Chief Justice Shaw speaks of fire insurance as a contract with one having an interest in property to indemnify him against any loss *he may sustain* in case the property is destroyed or damaged by fire. But the real question was as to the right of a subsequent purchaser of the property to recover under a policy issued to his grantor and not assigned.

the destruction of or injury to the property within the terms of the contract. Judges have frequently qualified the expression as to indemnity by saying that the contract is not a perfect contract of indemnity,<sup>1</sup> but the disposition has been very strong to reason out every question arising as to the liability of the insurer on the theory that indemnity only has been contracted for.<sup>2</sup> The Supreme Court of Massachusetts adopted from the first the view that the insurer should pay the stipulated sum on the happening of the event insured against, without regard to whether it was necessary to indemnify the insured or not,<sup>3</sup> and there was certainly nothing inconsistent with this in the English cases which had been decided up to that time. Accordingly the same court has denied to the insurer the right of subrogation to the mortgagee's lien, on payment of the loss to the mortgagee,<sup>4</sup> it being insisted that the insurance by the mortgagee is not an insurance of his debt but an insurance on the property, and that the insurance money is only a return of the premiums paid, the larger sum to be received in the event a loss happens, being fixed in just proportion to the chance that it will not happen and that the premium will have been paid without any return; and the court is not annoyed by the fact that the mortgagee may, by subsequently recovering the mortgage debt, get double satisfaction for his loss. It is needless to cite here cases to the effect that by the great weight of authority the insurance company is entitled to subrogation without any express stipulation to that effect.<sup>5</sup> But courts which have recognized the right of subrogation have nevertheless insisted that the

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<sup>1</sup> See for instance *Irving v. Manning*, 1 H. L. C. 287, 307; *Aitchison v. Lohre*, 4 App. Cas. 755, 761.

<sup>2</sup> See the language used in *Castellain v. Preston*, 11 Q. B. D. 380, especially on pages 386, 388, and 400.

<sup>3</sup> In *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40, it is said that the value of the interest of assured in the property is not material; "if he had an insurable interest at the time the policy was effected, and an interest also at the time of the loss, he is entitled to recover the whole amount of damage to the property not exceeding the sum insured." And in *King v. State Mut. F. Ins. Co.*, 7 Cush. 1, Chief Justice Shaw in very vigorous language insists that a mortgagee who has insured for his own benefit and paid the premiums out of his own funds may recover for the loss insured against, and having the same insurable interest at the time of the loss which he had at the time of the contract he is entitled to recover a total loss. The court therefore refused to require the mortgagee to assign his security to the insurance company as a condition precedent to payment of the loss to him by the company.

<sup>4</sup> *Suffolk F. Ins. Co. v. Boyden*, 9 Allen, 123.

<sup>5</sup> See especially, however, *Honore v. Lamar F. Ins. Co.*, 51 Ill. 409; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541.



insurance is of the property and not of the interest of the insured in the property; that is, that in case of insurance of a mortgagee's interest the insurance is against loss of the property itself and not merely against loss of the mortgage debt.<sup>1</sup> It has probably not been held by any court, however, that a mortgagee insuring the property in his own interest can recover more than the amount of his lien. For instance, if his claim has been reduced by payment to less than the amount of the insurance, there is no authority for his recovering even in case of total loss a larger sum than the amount of his claim. In fact the cases are inconsistent in language rather than in result, for no court denies to the mortgagee recovery to the amount of the loss, provided it does not exceed the extent of his claim or the sum named in the policy, even though he may be required to turn over to the company his security. In other words, the company is not allowed to show that he is not really damaged and that the remaining security is ample. But if in any contingency the loss is or may be to his detriment, he recovers the amount of the loss so far as it may thus possibly be to his detriment, not exceeding, of course, the sum insured.

There is the same general harmony among the cases relating to recovery by vendor and vendee, although these cases also contradict each other in the language used in reaching the result. But inasmuch as the vendee is liable for the balance of the purchase money, no court holds that he is restricted in his recovery to the amount which he has paid;<sup>2</sup> nor is the vendor limited to the mere impairment of his security, but he recovers the full amount which he might possibly lose by the loss of the property, that is, the full amount of the loss not exceeding the money remaining unpaid. The English Court of Appeal has gone further in the enforcement of the doctrine of indemnity in these cases, and has held that while the vendor may recover insurance money to the extent of the unpaid purchase price, yet upon subsequently recovering the purchase price he is bound to return to the insurance company the amount received;<sup>3</sup> and the judges give to the doctrine of indem-

<sup>1</sup> *Kernochan v. New York Bowery F. Ins. Co.*, 17 N. Y. 428; *Excelsior F. Ins. Co. v. Royal F. Ins. Co.*, 55 N. Y. 343.

<sup>2</sup> *Tylor v. Aetna F. Ins. Co.*, 12 Wend. 507; *Aetna F. Ins. Co. v. Tyler*, 16 Wend. 385; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568.

<sup>3</sup> *Castellain v. Preston*, 11 Q. B. D. (C. A.) 380 (1883). On the hearing of this case in the Queen's Bench (8 Q. B. D. 613), Chitty, J., had taken the view that the doctrine of subrogation was to be somewhat strictly limited to cases where a third party was directly liable to the insured for the same loss which was covered by the policy of insurance.

nity the widest possible application, so that whenever it appears that by receiving or retaining the insurance money the insured is more than indemnified, the insurance company is to be protected to the extent to which the insurance money to be paid or already paid exceeds a full indemnity.

But it must be evident that, however liberal the courts may be in restricting the insured to a full indemnity, they must not adopt a rule of construction which may result in less than indemnity; and if the loss is an uncertain or indefinite one, justice requires that the company shall pay the insurance money, even though it may possibly put the insured in a better position than had no loss occurred, rather than throw upon him the burden of establishing the amount of a loss which is incapable of estimation. A pertinent illustration is that of insurance taken by the husband on premises occupied with the wife as a homestead, the title however being in the wife's name. It is plain that in such a case the husband has an insurable interest, for he has by law the right to occupy during life, — a right of which no act of the wife can deprive him, and a right incapable of any definite estimation in money damages. Therefore, if an insurance company sees fit to insure the premises under a contract with him, it ought to pay the amount of the policy, not exceeding the amount of injury by fire, without regard to the length of time during which the husband's right of occupancy will probably continue.<sup>1</sup> A somewhat analogous case is that of insurance by a tenant of buildings which he has the right to remove, and under such circumstances it has been held that his recovery in case of loss before the end of his term should be based on the value of the building destroyed, estimated in the usual way, and not on the value of the building to the insured, in view of the fact that within a very short time it would have been necessary for him to remove it.<sup>2</sup> And in general the recovery by a tenant is hardly to be limited to his pecuniary loss by the destruction of the building, measured by the extent of the unexpired portion of his term, for the reason "that he insures more than the marketable value of his property, and he loses more than the marketable value

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<sup>1</sup> *Merrett v. Farmers' Ins. Co.*, 42 Ia. 11. So a husband who is tenant by curtesy of real property of his wife after issue born may, under a policy of insurance taken on the property in his own name, recover the full amount of the damage to the property, not exceeding the sum insured, without regard to the value of his interest. *Franklin M. & F. Ins. Co. v. Drake*, 2 B. Mon. 47; *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543.

<sup>2</sup> *Laurent v. Chatham F. Ins. Co.*, 1 Hall, 40; *s. c. Bennett, F. Ins. Cas.* 213.



of his property; he loses the house in which he is living and the beneficial enjoyment of the house, as well as its pecuniary value."<sup>1</sup>

The question as to the measure of recovery under a policy taken by a life tenant has several times been referred to by the English courts, and not uniformly to the same effect. In one case<sup>2</sup> it is suggested, by way of illustration, that where the interests of two persons in the same property are insured in separate policies, if those two interests between them make up the whole of the property, as in the case of a tenant for life and remainderman, each would recover under his policy the value of his own interest, although the language of the policies might indicate an insurance to each of the whole of the property; while in another case it is said, with reference to the same illustration, that it has never been heard suggested that the insurance company could cut down the claim of the tenant for life under his policy by showing that "he was of extreme old age, or suffering from a mortal disease."<sup>3</sup> But again it is doubted whether "if a life tenant, having intended to insure only his life estate, dies within a week after the loss by fire, the court would award his executors the whole of the value of the house."<sup>4</sup> There seems to be no direct adjudication, however, that the life tenant cannot recover for damage to the property to the extent of the sum insured, and there ought to be no doubt of his right to do so; for there is certainly no definite rule by which his recovery can be measured which allows him less. The question as to insurance by life tenant has, however, taken the form in this country of an issue as to whether the reversioner or remainderman is to have any interest in the insurance money recovered by the life tenant. Where the insurance is in any sense for the benefit of the life tenant and the reversioner or remainderman jointly, — as, for instance, where the policy is taken by the owner of the property before his death, and the loss does not occur till after his death and while the premises are in the possession of his widow as life tenant,<sup>5</sup> — the proceeds should be treated as standing in place of the property, and the life tenant should have the use of the fund for life, to be turned over to the reversioner or remainderman on the termina-

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<sup>1</sup> Bowen, L. J., in *Castellain v. Preston*, 11 Q. B. D. 380, 400.

<sup>2</sup> *North British, etc. Ins. Co. v. London, etc. Ins. Co.*, 5 Ch. D. 569, 583.

<sup>3</sup> *Rayner v. Preston*, 18 Ch. D. (C. A.) 1, 15.

<sup>4</sup> *Castellain v. Preston*, 11 Q. B. D. (C. A.) 380, 401.

<sup>5</sup> *Haxall's Ex'rs v. Shippen*, 10 Leigh, 536.



tion of the life tenancy.<sup>1</sup> In cases where insurance is taken by the life tenant at his own expense and in his own interest, contradictory views have been entertained as to the relation of the parties to the insurance money. On the one hand it is insisted that the life tenant holds the premises in trust for the reversioner or remainderman, and therefore that insurance money, standing to some extent in place of the property, must be accounted for at the termination of the life estate.<sup>2</sup> But this reasoning is far from satisfactory. There seems to be no proper ground for saying that the life tenant occupies a position of trust towards the remainderman, any more than one co-tenant is in a position of trustee toward the other; yet in the cases just cited a distinction of this kind is attempted, the same court having previously held that insurance taken by one tenant in common did not inure in any way to the benefit of his co-tenants.<sup>3</sup> A more reasonable position seems to be that of the Massachusetts court which denies to the remainderman any interest in insurance money under a policy taken by the life tenant in his own right and at his own expense.<sup>4</sup> There would be no difficulty as to the measure of recovery under the doctrine that the life tenant holds the insurance money for the remainderman; but under the Massachusetts decision it might be contended that the life tenant should have only the value of his interest. Evidently, however, as suggested above, there is no measure of the injury done to that interest which can be satisfactorily adopted short of the value of the premises destroyed; for the life tenant ought to have, not merely the market value of the injury to his estate based on life tables, but the amount of insurance which he has paid for, unless that amount clearly exceeds any possible damage which he can suffer by the loss of the property.

Where one holds property as bailee, or under a similar trust relation, he may undoubtedly insure to the extent of the value of the

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<sup>1</sup> In the case just cited it was held that the life tenant had no right to use the money in restoring the building destroyed; but in a later case in the same court, where the loss was a partial one, it was thought that the life tenant had a right to the insurance money for the purpose of making repairs. *Brough v. Higgin*, 2 Gratt. 408. In *Welsh v. London Assur. Corp.*, 151 Pa. St. 607, it appeared that the insurance was jointly for the benefit of the remainderman and the life tenant, and it was held that the latter could recover the entire loss, and would become trustee for the remainderman as to the excess of the recovery over the value of the life interest.

<sup>2</sup> *Clyburn v. Reynolds*, 31 S. C. 91; *Green v. Green* (S. C.), 27 S. E. Rep. 952.

<sup>3</sup> *Annelly v. De Saussure*, 26 S. C. 497.

<sup>4</sup> *Harrison v. Pepper*, 166 Mass. 288.

property, and recover to the extent of any possible damage which the loss of the property may impose upon him, and, inasmuch as it cannot be determined with reference to property which one person holds possession of for another what his liability might be in every possible event, it would seem that he ought to recover on the basis of the full amount of the loss, unless the extent of his liability has in some way become definite. Even though he is a mere custodian under stipulations exempting him from liability, it would not follow that he could not possibly be liable for the destruction of the goods in his custody by reason of his negligence or that of his servant, and against this negligence he has a right to insure. But the cases of insurance by bailee have not turned on this question. When the bailee has sought to recover under an insurance policy on the basis of the full amount of the loss, the courts have looked ahead to see what will become of the insurance money when it is paid. In their zeal to avoid unjust enrichment on the part of the bailee they have adopted the plan of treating him as taking insurance, not for his own benefit alone, but for the benefit of the owner as well; and on the theory that any excess over the bailee's own loss will be accounted for to the owner, they have allowed him to enforce payment of the full amount of the loss.<sup>1</sup> This class of cases may be distinguished from that of mortgagor and mortgagee and vendor and vendee, in which it is said that the owner of the property shall not have the advantage of insurance taken by one having a lien unless the lien-holder has been under obligation to protect the owner, or has intended to do so, by the fact that in the bailment cases the person having a limited interest holds the property itself, and not a mere lien upon it, and holds that property in trust for the owner; and they are distinguished from the cases of co-tenancy or life tenancy above referred to by the fact that in these cases there is no relation of trust, the rights of the party who takes the insurance not being derived from the party for whose benefit it was sought to apply the proceeds of the insurance.

The bailment cases are made to hinge on the question of authority of the bailee to insure for the benefit of the owner, and it is said that the relation of the parties is such that the bailee, taking a policy on the basis of the full value of the goods, will be presumed to have intended it for the benefit of the bailor so far as not necessary to protect the bailee himself from loss, and there-

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<sup>1</sup> *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *Hough v. Peoples' F. Ins. Co.*, 36 Md. 432.

fore that, on adoption by the bailor, even after loss, the policy inures to his benefit.<sup>1</sup> Where the policy covers "property held in trust or on commission," or uses like general designation, such as is employed in floating policies, it is likened to a marine policy "to whom it may concern," and the beneficiary may be left for subsequent determination.<sup>2</sup> Therefore it is wholly immaterial whether there is any liability of the bailee to the owner with reference to the loss of the goods, the insurance not being looked upon merely as a protection to the bailee, but also as taken for the benefit of the owner.<sup>3</sup> If the bailee recovers under the policy, the owner may maintain action against him for the money thus received on account of the owner's goods, and if the policy thus covers goods of different owners in the bailee's possession, they may recover from him proportionally.<sup>4</sup> In view of the interpreta-

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<sup>1</sup> *Waters v. Monarch F. & L. Assur. Co.*, 5 E. & B. 870; *DeForest v. Fulton F. Ins. Co.*, 1 Hall, 84; s. c. 1 Bennett, F. Ins. Cas. 223; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. 242. In an action on a marine policy, the English Court of Common Pleas was equally divided on the question whether a consignee could recover more than advances and commissions under a policy taken for himself and others. *Ebsworth v. Alliance Marine Ins. Co.*, L. R. 8 C. P. 596.

<sup>2</sup> *Lee v. Adsit*, 37 N. Y. 78; *Waters v. Monarch F. & L. Assur. Co.*, 5 E. & B. 870; *Fire Ins. Assn. v. Merchants & Miners' Transp. Co.*, 66 Md. 339. If the premiums are charged to the owner, that will be evidence that the policy was taken for the owner's benefit: *Miltenberger v. Beacom*, 9 Pa. St. 198; but the other cases do not suggest that this fact is essential.

<sup>3</sup> *Fire Ins. Assn. v. Merchants & Miners' Transp. Co.*, 66 Md. 339; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606.

<sup>4</sup> *Siter v. Morris*, 13 Pa. St. 218; *Snow v. Carr*, 61 Ala. 363. It is of course competent to show that the insurance was taken for the protection of only one class of property, although in terms it might cover other property; thus, if the bailee is under obligation to insure as to certain property, and has no such obligation as to other property, he may insist on applying the insurance to the satisfaction of his loss on his own property and on the property which he was bound to insure, leaving the other unprotected. The right to insure does not necessarily impose the duty to do so. *Reitenbach v. Johnson*, 129 Mass. 316; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1; *Martineau v. Kitching*, L. R. 7 Q. B. 436. Therefore the bailee may abandon insurance which he has taken covering goods in his possession without liability to the owner in case of a subsequent loss. *Stillwell v. Staples*, 19 N. Y. 401. The bailee of course has the first claim on the insurance money, and has the same lien upon it that he had upon the property: *Johnson v. Campbell*, 120 Mass. 449; and undoubtedly he is entitled to have the insurance money applied in satisfaction of any liability which may exist on his part in connection with the loss of the property; but it seems that if the policy was intended for the protection of all the property in his possession, he must account *pro rata* to owners of property held in trust, and cannot retain the money for the entire satisfaction of loss to his own property. *Snow v. Carr*, 61 Ala. 363.



tion put upon insurance by a bailee, it is evident that such insurance, if ratified by the owner, becomes concurrent with other insurance taken by the owner on the same property, and subject to contribution or prorating, according to the provisions of the policies with reference to such insurance.<sup>1</sup> No doubt where payment in full is made under a policy to the owner, and it appears that he is entitled to the proceeds of insurance taken by the bailee, the insurance company which has paid in full could recover back the amount paid beyond its proportional share of the loss, or have contribution from the other company as the policies may authorize.

A class of cases in which insurance is taken by a stockholder in his own name upon the corporate property would be of interest with reference to the rule of indemnity if that question had been raised, but the controversy seems to have always turned on the question whether the stockholder has an insurable interest, and, so far as appears, he has been allowed to recover the full amount of the loss of the property, without regard to the extent to which his interest may have been affected by such loss.<sup>2</sup>

The rule of indemnity which was first invoked merely to distinguish a wager policy from one based on interest has therefore, it seems, become a rule also for determining the amount of loss to be paid, with the limitation, however, that where the interest of insured is indeterminate, he shall not be denied full indemnity against possible damage from the loss. The insurance company may, by requiring a disclosure of the interest of the insured, and by refusing to insure on the basis of an indeterminate interest, protect itself if it chooses from liability in such cases. Indeed, most of the questions of this kind which have arisen have been practically settled by changes in the language of the customary policy rather than by adjudication of the courts. But if the insurer sees fit to issue a policy based on an indeterminate or contingent interest, there is no reason for so limiting the right of recovery of insured as to deprive him of full protection. The in-

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<sup>1</sup> *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

<sup>2</sup> *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7; *Warren v. Davenport F. Ins. Co.*, 31 Ia. 464. In an action on an insurance policy taken by a shareholder in the Atlantic Telegraph Company against loss in the adventure of laying the first Atlantic cable, which was not successfully laid, it was held that the shareholder could recover the full amount of the policy; but the insurance was marine, and therefore the policy was valued, and the question of the damages could not have been in controversy. *Wilson v. Jones*, L. R. 2 Ex. 139.

suror may still have relief by subrogation, or perhaps by recovering back any excess of insurance money over full indemnity, when it appears by subsequent events that the contingent damage has not happened and cannot happen.

Briefly, the obligation to make indemnity may be indicated as follows:—

1. Fire insurance is a contract of indemnity against damages to the insured by reason of loss or injury to the property by fire.

2. The recovery for a loss should not exceed the damage, certain or contingent, which insured has suffered, or may suffer, by reason of the loss.

3. If the interest of the insured is that of ultimate owner, with a limitation in the nature of a lien to secure his indebtedness, he is entitled to full indemnity for loss of, or injury to, the property to the extent of the insurance, for the loss falls upon him. If his interest is that of a lien-holder, his recovery should be for the amount of his lien.

4. In case of a lien-holder, bailee, or other person having a contingent or temporary interest, the doctrine of indemnity leads to subrogation, and perhaps to a right to recover from insured any amount paid beyond the damage which subsequently appears to have been suffered.

5. The right of subrogation is not a primary right of insurer, but arises only as between himself and insured to prevent the ultimate realization by the insured of more than full indemnity.<sup>1</sup>

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<sup>1</sup> Thus a contract between mortgagor and mortgagee by which the insurance money is to inure to the benefit of the mortgagor, though this contract is not known to the insurer, will cut off the right of insurer to subrogation to mortgagee's lien. *Kernochan v. New York Bowery Ins. Co.*, 17 N. Y. 428. And a contract between bailor and bailee by which the insurance taken by a bailor shall be held as indemnity for the loss for which bailee may be responsible will cut off subrogation to any claim against bailee. *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312 (dissenting opinion, 118 U. S. 210); *Jackson Co. v. Boylston Ins. Co.*, 139 Mass. 508; *Platt v. Richmond, Y. R. & C. R. Co.*, 108 N. Y. 358. But by stipulation in the policy, insurer may prevent any contract by insured which will cut off such right of subrogation. *Inman v. South Carolina R. Co.*, 129 U. S. 128; *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324. Indeed, concealment of such an existing arrangement might, under some circumstances, be material, and defeat the policy. *Tate v. Hyslop*, 15 Q. B. D. 368. The application of the doctrine of subrogation to prevent double payment for the same loss, even under distinct policies, is illustrated by the case of *West of Eng. F. Ins. Co. v. Isaacs*, 1 Q. B. D. (1897) 226 (C. A.), where it appeared that lessor and lessee of premises had each insur-

THE FEDERAL CONTRACT LABOR LAW.<sup>1</sup>

THE contract labor laws of the United States have now been in operation about twelve years, the first act having been approved Feb. 26, 1885.<sup>2</sup> Enough time has therefore elapsed to make possible a fair summing up of the working and results of these laws. Up to the end of the fiscal year 1897 the contract labor acts have excluded or caused to be returned within one year after landing 6,202 immigrants out of a total of 5,367,698 immigrants arriving during the thirteen years, or eleven one-hundredths of one per cent. The average number excluded each year has been about 517.

The acts were originally passed at the demand of labor organizations and others who felt that the right to hire workmen of any sort in a foreign country, and to bring them to the United States in any numbers, placed the workingmen of this country at an unfair disadvantage in their efforts to better their condition and secure steady employment. Owing to the degraded condition of many of the laborers at first imported to work in the mines, it was also felt that the social fabric and standard of living among the natives and earlier immigrants were threatened unless some check were put upon the exercise of this right. It was obvious that certain exceptions would have to be made in any law regulating the subject, and therefore private secretaries or servants engaged by foreigners resident in the United States, skilled workmen for new industries not established in the United States, if such workmen cannot be otherwise obtained, professional actors, artists, lecturers, singers, personal or domestic servants, ministers of any religious denomination, professional persons and professors for colleges and

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ance for his own benefit, and that the lessor was under obligation to insure and use insurance money in making repairs, and it was held that lessee, who, after loss and recovery of insurance money, had released lessor from the obligation to repair (to which the company insuring lessee had been subrogated by payment of the loss), must pay back to the company the insurance money collected by him.

<sup>1</sup> This article includes cases reported to Jan. 1, 1898.

<sup>2</sup> 23 Stat. 332. The subsequent acts are those of Feb. 23, 1887 (24 Stat. 414), Oct. 19, 1888 (25 Stat. 566), March 3, 1891 (26 Stat. 1084), March 3, 1893 (27 Stat. 569).

By the acts of Feb. 23, 1887, and March 3, 1891, the procedure in respect to contract laborers was assimilated to that of the other excluded classes of immigrants.



seminaries, do not come under the provisions of the law, nor does the law prevent a resident from assisting any member of his family to emigrate to this country for the purpose of settlement.<sup>1</sup>

As the law applies in terms only to "immigrants," certain other classes of persons entering the country are not subject to its terms. Such are unnaturalized residents in the United States who go abroad for a visit and return to their work here;<sup>2</sup> also persons who come across the Canadian frontier to perform daily labor and return at night, even though they be under contract.<sup>3</sup> The fact that the contract labor laws have failed to exclude this latter class of persons, contrary to the expectation of their framers, has led to great dissatisfaction on the part of all workingmen with whom Canadians compete, especially in places like Detroit, Suspension Bridge, and other border towns. This dissatisfaction found expression in the so-called "Corliss Amendment" annexed to the immigration bill passed by the Fifty-fourth Congress, which aimed at suppressing all day labor by persons retaining their residence in a foreign country, whether under contract or not. This bill was vetoed March 2, 1897.

By far the most serious blow which has been dealt these acts by the courts relates to the contract under which the laborers come here to work. The act of 1885 made it unlawful for any person, company, partnership, or corporation to prepay the transportation, or in any way assist or encourage the importation or immigration, of any foreigner to this country under a previous contract or agreement, whether parol or special, whether express or implied, to perform labor or service of any kind here. The act of 1891 provides that immigrants must show affirmatively, in order to be entitled to land, that they do not come in violation of the act of 1885. The act of 1893 provides that every immigrant before embarkation must state whether he is under contract to perform labor in the

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<sup>1</sup> Acts Feb. 26, 1885, § 5, and March 3, 1891, § 5. The provision in the former act that residents might assist "any relative or personal friend" to emigrate was repealed by the latter act.

<sup>2</sup> *Re Martorelli*, 63 Fed. Rep. 437; *Re Maiola*, 67 Fed. Rep. 114.

<sup>3</sup> This is on the theory that such persons do not intend to acquire a temporary or permanent home here. In *U. S. v. Michigan Central R. R.*, 48 Fed. Rep. 365, the court said of an office clerk who resided in Canada and worked for the defendant at Suspension Bridge, that he was not imported each day any more than he was exported at night, and that though the promoters of the contract labor law might have intended to remedy such a mischief as this, yet it was not within the ordinary meaning of the act.

United States.<sup>1</sup> Any immigrant coming in consequence of an advertisement printed and published in a foreign country is also to be regarded as a contract laborer.<sup>2</sup>

Such was the state of the statute law when the case of *United States v. Edgar* was decided in the Circuit Court of Appeals for the Eighth Circuit.<sup>3</sup> In this case an alien in England wrote to a person in the United States, saying that the writer had heard that the party addressed was in want of men to do a certain kind of work, and, if convenient to send passes, another alien and himself would "come out." To this letter a third person, to whom the same was handed, replied: "I have this day bought two tickets for you. . . . Take this letter to R. S. & Co. . . . and get tickets. . . . We can give you steady work. . . . Tickets will not be good after July 18." The court held that the word "contract" in the statutes means an enforceable contract, express or implied, at the time the alien is examined at the port of entry. In such a case the assistance and promise of work given by the person in the United States are only an offer, and the proposition of the laborer is likewise only an offer to go to the United States. There is no promise to employ or to be employed. Even if a definite promise of work is given on condition that the alien comes to this country and enters into the employment, this is only an offer, which is ripened into a unilateral contract by the actual coming of the alien into the country. Until he is passed by the immigration officials he has not technically entered or been landed in the country, and there is no contract under which he can be debarred from entrance.<sup>4</sup>

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<sup>1</sup> Act Feb. 26, 1885, § 1; Act March 3, 1891, § 1; Act March 3, 1893, §§ 1, 2. *Moller v. U. S.*, 57 Fed. Rep. 490; *U. S. v. Edgar*, 58 Fed. Rep. 91; 45 Fed. Rep. 44.

<sup>2</sup> Act March 3, 1891, § 3.

<sup>3</sup> *U. S. v. Edgar*, 45 Fed. Rep. 44; 48 Fed. Rep. 91 (1891).

<sup>4</sup> Contrary to the above rule is the case of *U. S. v. Great Falls & Canada R. R. Co.*, 53 Fed. Rep. 77 (Circuit Ct. Montana, 1892). In this case the complaint alleged that the defendant offered to one of its employees in Canada to continue his employment if he would come to the United States and perform labor, and that in consideration of such promise, and in pursuance of such agreement, he did come to the United States and work for the defendant. Knowles, J., said that the moment the laborer started to begin his journey toward the United States there was a sufficient acceptance of the defendant's offer in Canada to make a contract within the meaning of the law, under the Montana rule that pleadings shall be liberally construed with a view to substantial justice.

It is submitted that no construction of pleadings can supply a necessary element of a contract, and that the defendant here promised work to the laborer in consideration of his coming to the United States, not in consideration of his starting to come. The case is not to be supported.

On the other hand, the general constitutionality of such acts has been fully sustained.<sup>1</sup> An objection that Congress has no power to punish soliciting or other acts done in a foreign country has been held untenable on the ground that the offence is completed when the laborer enters the United States, and that the act is therefore within the jurisdiction of the courts here. But the courts go further, and hold that even were this not so, the United States can punish offences committed by Americans abroad.<sup>2</sup>

Mention has already been made of the exceptions which it was found necessary to make in the contract labor acts. One of these at least was found to be a loophole through which evasions found easy passage; and the provision in the act of 1885 that residents in this country might assist "any relative or personal friend" to emigrate was amended so as to limit the privilege to assisting a "member" of the resident's family."<sup>3</sup> Persons may come to work in a "new industry," though the industry has been established several years, if it be only confined to a few establishments,<sup>4</sup> and though similar articles or parts of the same article have been made in the United States before.<sup>5</sup> It must appear, however, that suitable labor could not be obtained in this country, and that workmen could not be trained to the special work within a reasonably short time.<sup>6</sup>

To entitle one to enter as an "artist" it must appear that one is such a person in the ordinary sense; and milliners, cooks, or boot-blacks cannot evade the law by styling themselves such.<sup>7</sup> An alien imported to run a dairy for profit is not a "domestic ser-

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<sup>1</sup> The provision of the act of 1891, putting upon the immigrant the burden of showing affirmatively that he is not a contract laborer, was held to be constitutional in the case of *Ekin v. U. S.*, 142 U. S. 651. On the constitutionality of these acts see generally *Re Cummings*, 32 Fed. Rep. 75; *U. S. v. Craig*, 28 Fed. Rep. 795; *Re Florio*, 43 Fed. Rep. 114; *Lees v. U. S.*, 150 U. S. 476; *Church of Holy Trinity v. U. S.*, 143 U. S. 457; *Chinese Exclusion Case*, 130 U. S. 581; *Fong Tue Ting v. U. S.*, 149 U. S. 698. Compare as to the constitutionality of the general immigration act of 1882, *Edye v. Robertson*, 112 U. S. 580.

<sup>2</sup> *U. S. v. Craig*, 28 Fed. Rep. 795. Cf. *Ekin v. U. S.* 142 U. S., 65; *Lees v. U. S.* 150 U. S. 476; *Re Florio*, 43 Fed. Rep. 114.

<sup>3</sup> Acts Feb. 26, 1885, § 5; March 3, 1891, § 5.

<sup>4</sup> *U. S. v. Bromily*, 58 Fed. Rep. 554. See *U. S. v. Thompson*, 41 Fed. Rep. 28.

<sup>5</sup> *U. S. v. McCullum*, 44 Fed. Rep. 745.

<sup>6</sup> *U. S. v. McCullum*, *supra*. The mere advertising for such labor is not of itself sufficient diligence in trying to obtain labor in this country to justify contracting for foreign labor.

<sup>7</sup> *U. S. v. Thompson*, 41 Fed. Rep. 28.



vant" under the act;<sup>1</sup> but *aliter* of an "under coachman" who acts as driver to a family.<sup>2</sup> The express exception of clergymen in the act of 1891 was declaratory of a previous decision that such persons were not intended to be covered by the previous act.<sup>3</sup> A chemist is a "professional person," although he agrees to give his entire time to his employer for a certain period.<sup>4</sup>

Such being the construction of these laws, let us consider for a moment the judicial machinery provided for their execution and interpretation. The act of 1891 provides that inspection officers of the United States shall board vessels and examine immigrants, and all decisions by such officers excluding aliens are final, unless reversed on appeal by the Secretary of the Treasury.<sup>5</sup> Where an immigrant is detained by an inspector for special inquiry because there appears to be some doubt whether he is entitled to land, such inquiry is conducted by not less than four inspectors. The immigrant can be admitted only upon a favorable decision made by these inspectors, and any dissenting inspector may appeal to the Commissioner General of Immigration, whose action is subject to review by the Secretary of the Treasury.<sup>6</sup> An immigrant refused admission to land is entitled to a special inquiry into his case, even where upon the preliminary examination he has given testimony which if true would place him among the excluded classes.<sup>7</sup>

No act prior to that of 1891 conferred any power upon the courts to review the decisions of the executive officers upon the evidence before them; and the acts of 1891 and 1894 expressly provide that such decisions shall be final, although the act of 1891 confers full and concurrent jurisdiction, civil and criminal, upon the circuit and district courts of all causes arising under the provisions of that act.<sup>8</sup> Mention has been made of the fact that the burden of proving the absence of a contract to labor has been put upon the immigrant by the act of 1891. The inspectors are not therefore required to base

<sup>1</sup> *Re Cummings*, 32 Fed. Rep. 75.

<sup>2</sup> *Re Howard*, 63 Fed. Rep. 263.

<sup>3</sup> *Trinity Church v. U. S.*, 143 U. S. 357; 36 Fed. Rep. 303.

<sup>4</sup> *U. S. v. Laws*, 163 U. S. 258.

<sup>5</sup> Act March 3, 1891, § 8; Act Aug. 18, 1894. See Act Feb. 23, 1887, § 6. *Re Tom Yum*, 64 Fed. Rep. 485; *U. S. v. Rogers*, 65 Fed. Rep. 787; *Re Maiola*, 67 Fed. Rep. 114. Cf. Act March 3, 1891, § 8.

<sup>6</sup> Act March 3, 1893, § 5.

<sup>7</sup> *Re Berjanski*, 47 Fed. Rep. 445.

<sup>8</sup> Act March 3, 1891, § 13; Act Aug. 18, 1894 (28 Stat. 390). These provisions have been held to be constitutional. *Ekin v. U. S.*, 142 U. S. 651; *Re Tom Yum*, 64 Fed. Rep. 485; *U. S. v. Rogers*, 65 Fed. Rep. 787.

their decision excluding the immigrant upon any specific evidence showing the alien to be within the law. The courts cannot review their action, and the only remedy is by appeal as above stated.<sup>1</sup> And even under the acts prior to 1891 the settled course of decision was that, where the commissioners had had competent evidence upon which to base their decrees, the courts could not review their action.<sup>2</sup>

Inquiry into the facts by the court may always be had upon *habeas corpus*, so far as is necessary to determine whether the tribunal excluding the alien had jurisdiction.<sup>3</sup> Thus, inasmuch as the power of returning persons not allowed to land is confined to "alien immigrants," the question whether persons are of that description is a question of jurisdiction, and may be determined by the courts on *habeas corpus* proceedings; <sup>4</sup> but additional evidence

<sup>1</sup> "... the final determination of those facts [on which the right to land depends] may be intrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted." Gray, J., in *Ekiu v. U. S.*, 142 U. S. 651.

<sup>2</sup> *Re Day*, 27 Fed. Rep. 678; *Re Cummings*, 32 Fed. Rep. 75; *Re Stupp*, 12 Blatch. 501-519; *Re Dietze*, 40 Fed. Rep. 324; *Re Vito Rullo*, 43 Fed. Rep. 62; *Re Berjanski*, 47 Fed. Rep. 445.

These provisions are therefore quite different from those in the earlier Chinese exclusion acts. The latter gave the courts power to review facts. See *Re Jung Ah Lung*, 25 Fed. Rep. 141, 143; 124 U. S. 621; *Ekiu v. U. S.*, 142 U. S. 651. So in *Re Feinknopf*, 47 Fed. Rep. 447, the question was whether an immigrant was liable to become a public charge. The commissioner disbelieved all the evidence offered by the immigrant, and excluded him. Benedict, J., held that, although the inspector might properly disbelieve the evidence offered, yet there must be some evidence against the immigrant to justify his exclusion. In *Re Didfirri*, 48 Fed. Rep. 168, where laborers first stated a contract on general examination, and later retracted their statements, it was held that there *was* some evidence to justify a finding excluding them. Lacombe, J., said: "Appellate tribunals have been created by the immigration law to correct any errors of the commissioner of immigration in cases where there is conflicting testimony. Where there is some competent evidence before the commissioner sustaining his ruling, this court will not interfere because there was also before him contradictory testimony which he apparently disbelieved."

<sup>3</sup> *Re Day*, 27 Fed. Rep. 681; *Re Cummings*, 32 Fed. Rep. 75; *Re Dietze*, 40 Fed. Rep. 324; *Re Panzara*, 51 Fed. Rep. 275; *Re Vito Rullo*, 43 Fed. Rep. 62; *Re Tom Yum*, 64 Fed. Rep. 485; *Re Maiola*, 67 Fed. Rep. 114. See also *Re Fowler*, 18 Blatch. (U. S.) 430, 443; *Re Stupp*, 12 Blatch. (U. S.) 501, 519; *Re Wadge*, 15 Fed. Rep. 864; *Re Byron*, 18 Fed. Rep. 722; *Benson v. McMahon*, 127 U. S. 457; *Chew Heong v. U. S.*, 112 U. S. 536; *U. S. v. Jung Ah Lung*, 124 U. S. 621; *Wau Shing v. U. S.*, 140 U. S. 424; *Lau Ow Bew, Pet'r*, 141 U. S. 583.

<sup>4</sup> *Re Panzara*, 51 Fed. Rep. 275; *Re Martorelli*, 63 Fed. Rep. 437; *Re Maiola*, 67 Fed. Rep. 275. See *Re Tom Yum*, 64 Fed. Rep. 485.

cannot be considered by the courts upon *habeas corpus*, and can be submitted only to the commissioner upon a rehearing.<sup>1</sup>

Where an alien makes an affidavit on the examination on the strength of whose contents he is excluded, the mere fact that the statements therein contained were false does not entitle him to be released upon *habeas corpus*; <sup>2</sup> nor the fact that questions were misunderstood or answers incorrectly translated; <sup>3</sup> nor the fact that a refusal to allow an immigrant to land obliges him to remain on the ship in which he came while she remains in port.<sup>4</sup>

Having considered briefly the construction of the contract labor laws and the machinery provided for enforcing them, let us turn our attention for a moment to the penalties prescribed for their violation and to the effect of these penal clauses.

The person, partnership, company, or corporation contracting for labor, or knowingly assisting, encouraging, or soliciting the importation of contract laborers, or advertising contrary to the provisions of law, forfeits one thousand dollars for each offence, to be recovered in a civil suit by the United States, or by any person who may sue therefor in a circuit or a district court of the United States.<sup>5</sup> The contract laborer may himself bring such suit. The sum recovered is to be paid into the treasury of the United States. A separate suit may be brought for each person imported under contract; and the district attorney of the United States is charged with the duty of prosecuting such suit.<sup>6</sup>

A declaration in debt for the penalty must allege (1) that the immigrant previous to entering into the United States was a party to a contract for his labor; (2) that he actually migrated in pursuance of such contract; and (3) that the defendant prepaid his transportation, or otherwise assisted, solicited, or encouraged his immigration.<sup>7</sup>

<sup>1</sup> *Re Day*, 27 Fed. Rep. 678.

<sup>2</sup> *Re Dietze*, 40 Fed. Rep. 324; *Re Didfirri*, 48 Fed. Rep. 168.

<sup>3</sup> *Re Vito Rullo*, 43 Fed. Rep. 62.

<sup>4</sup> *Re Florio*, 43 Fed. Rep. 114.

<sup>5</sup> Act Feb. 26, 1885, § 3; Act March 3, 1891, § 3; *Lees v. U. S.*, 150 U. S. 476.

The district courts have concurrent jurisdiction with the circuit courts, under U. S. Rev. St., § 563, which gives them jurisdiction of "all suits for penalties and forfeitures incurred under any law of the United States." Such jurisdiction is not taken away by the Act Aug. 13, 1888, providing that the circuit courts shall have original cognizance of "all suits of a civil nature" where the amount involved exceeds two thousand dollars, since this action is of a penal and *quasi* criminal nature. *U. S. v. Whitcomb Metallic Bedstead Co.*, 45 Fed. Rep. 89.

<sup>6</sup> Act Feb. 26, 1885, § 3.

<sup>7</sup> *U. S. v. Craig*, 28 Fed. Rep. 795; *U. S. v. Borneman*, 41 Fed. Rep. 751; *Moller*



The defendant need not have been a party to the contract at all. The declaration should further show the sort of labor contracted for and the substance of the contract,<sup>1</sup> and should set forth with particularity what acts were done to procure the immigration of the laborer;<sup>2</sup> perhaps, also, it should negative the exceptions provided in the statute.<sup>3</sup>

The action for the penalty is criminal in its nature, and the defendant cannot be compelled to testify against himself.<sup>4</sup> No such suit can be settled, compromised, or discontinued without the consent of the court entered of record, with the reasons therefor.<sup>5</sup>

Any person bringing or landing, or aiding the bringing or landing by vessel or otherwise, of aliens not entitled to land in the United States, is guilty of a misdemeanor and liable to a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both.<sup>6</sup> A person must take a physical part in the actual transportation of aliens to be liable under this provision.<sup>7</sup>

*v. U. S.*, 57 Fed. Rep. 490; *U. S. v. Gay*, 80 Fed. Rep. 254; *U. S. v. River Spinning Co.*, 70 Fed. Rep. 978.

In *U. S. v. Edgar*, 45 Fed. Rep. 44, the defendants contended that, inasmuch as the contract laborers were not allowed to land, they could not be said to have migrated to the United States, and that therefore they, the defendants, were not liable to the penalty. The court did not consider the question.

<sup>1</sup> *U. S. v. Gay*, 80 Fed. Rep. 254; *U. S. v. River Spinning Co.*, 70 Fed. Rep. 978. Thus, a declaration alleging an advertisement in a foreign newspaper, and that the contract provided for employment at a certain sum per week, and that the defendant agreed to refund to the immigrant his passage money, is defective in the above particulars. The court is not at liberty to infer that the agreement to refund the passage money was made before the immigrant arrived in this country. *U. S. v. Gay*, 80 Fed. Rep. 254.

<sup>2</sup> *U. S. v. Gay*, 80 Fed. Rep. 254; *U. S. v. River Spinning Co.*, 70 Fed. Rep. 978.

<sup>3</sup> *U. S. v. River Spinning Co.*, 70 Fed. Rep. 978.

<sup>4</sup> *Lees v. U. S.*, 150 U. S. 476; *U. S. v. Whitcomb Metallic Bedstead Co.*, 45 Fed. Rep. 89. Cf. *Coffey v. U. S.*, 116 U. S. 436; *Boyd v. U. S.*, 116 U. S. 616. *Contra*, that it is a civil matter, and a deposition may be used against the defendant. *Moller v. U. S.*, 57 Fed. Rep. 490 (1893, C. C. A. 5th Circuit). The action is really one of tort, and therefore where the laws of a State exempt from arrest in cases of contract, express or implied, such exemption cannot be claimed to cover this action. It may be begun by a writ of *capias* if authorized by the State law. *U. S. v. Banister*, 70 Fed. Rep. 44.

<sup>5</sup> Act March 3, 1891, § 2.

<sup>6</sup> Act March 3, 1891, § 6, apparently repealing by implication Act Feb. 26, 1885, § 4. The latter applied only to masters of vessels, and provided a fine of five hundred dollars with or without imprisonment for six months.

<sup>7</sup> So ruled by Mr. Justice Nelson (Dist. Court, Mass.) in the case of Cadwallader M. Raymond. The evidence tended to show that the defendant, a bicycle manufacturer, while in England, engaged two English mechanics to work for him, and had paid their fare to this country. The court ordered a verdict of not guilty. See Boston News, April 18, 1893. (Not officially reported.)

So much for penalties imposed upon those promoting the entrance of contract laborers. The laborers themselves, if found upon arrival to be such, are to be sent back to the countries whence they came, if possible upon the ship which brought them. The cost of their return, as well as of their maintenance while on land, is to be paid by the owners of the vessels bringing them in. The refusal to receive back the immigrants upon the vessel, the neglect to detain them on board, or to return them whence they came, and to pay the cost of maintenance, are all misdemeanors, and the master, agent, consignee, or owner is liable to a fine of three hundred dollars for each offence. The vessel cannot clear from any port while such fine is unpaid.<sup>1</sup>

Persons found within a year after entering the United States to have evaded the contract labor law, may be returned at the expense of the person, vessel, company, or corporation bringing them; if that cannot be done, they are to be returned at the expense of the United States.<sup>2</sup> The Secretary of the Treasury, if satisfied that any person has entered the country in violation of the law, may authorize the arrest and return of such person,<sup>3</sup> and his determination is conclusive and cannot be reviewed by the courts upon petition for *habeas corpus*.<sup>4</sup>

Let us now consider what criticisms upon the laws, as above set forth, have been made by those practically engaged in the enforcement of them. W. D. Owen, Superintendent of Immigration, in his report for 1892, said, p. 10: "It is safe to predict that another year of vigorous prosecutions of violators at the courts, and the detection and return of the laborers at our ports, will make imported laborers substantially a thing of the past." He also observes that since the passage of the act of March 3, 1891, "American advertisers in foreign countries have ceased offering a promise of employment, but otherwise continue advertisements as before." Herman Stump, in his reports for 1893 and 1894, said: "I cannot, however, refrain from expressing a hope that Congress will, at an early date, carefully revise and re-enact the laws upon the subject,

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<sup>1</sup> Act March 3, 1891, § 10. See Act Feb. 23, 1887, § 8.

<sup>2</sup> Act March 3, 1891, § 11.

<sup>3</sup> Act Oct. 19, 1888.

<sup>4</sup> *Re Howard*, 63 Fed. Rep. 263; *U. S. v. Arteago*, 68 Fed. Rep. 883; *Re Fong Tue Ying*, 149 U. S. 698. If, however, the warrant from the Secretary is defective, and the immigrant is therefore held prisoner without authority, as where the name of the immigrant or any similar name is not in the warrant, he may be released upon *habeas corpus*. *U. S. v. Amor*, 68 Fed. Rep. 885.

making them more certain, explicit, and comprehensive, and giving additional remedies to insure the enforcement thereof." In the report for 1894 he adds, p. 14: "This [increased number debarred in 1894] proves conclusively that the work is becoming more efficient, and that those who attempt to come in violation of law may anticipate deportation with a greater degree of certainty."

The special Immigration Investigating Commission of the Treasury Department which reported in 1895 says, in its report, p. 20: "It is now very rare for employers to attempt to import contract laborers in large gangs as they did formerly. A large proportion of those debarred of late years have been single workmen, and it is safe to say that a majority of them belonged to the best class that apply for admission to this country. Contracts were made for them by friends or relatives who wished to bring here those they had left at home, and who were prudent enough to secure work for them before doing so. . . . The experience of the immigration officials, which has been confirmed by the investigations of the commission, has shown that the present law is not of itself sufficient fully to accomplish the object of its enactment. Its strict enforcement in individual cases occasions great hardships, while, on the other hand, many who should be deported escape, and the employers who contract for them cannot be prosecuted by reason of its defects."

The Report of the Investigating Commission makes the following, among other suggestions: —

1. That some provision be made for regulating the immigration of cheap transient labor from contiguous countries.

2. That the original contract labor act of 1885 be amended so as to forbid the encouragement of immigration "by any undertaking or promise of employment upon arrival in the United States," or under any contract, etc. It will be noticed that this recommendation is intended to meet the decision of the courts above referred to, namely, that the contract must be complete before the immigrant lands in the country. Under the present law the immigrant may be deported and the employer get off, because the immigrant is often the only witness to the contract. The suggestion is to make soliciting on the part of the employer an offence without requiring proof of any contract.

3. It is also suggested that relatives of intending immigrants already in the United States, and not more remote than first cousins, should be allowed to make contracts for the immigrants



for work in their own business and under their own supervision, putting the burden of proving a compliance with the law upon the immigrant and his relative.

4. To extend the time for returning those found to have entered in violation of law to two years.

In the foregoing article I have not attempted to argue the wisdom or unwisdom, justice or injustice, of the contract labor acts, but to state their chief provisions and some of their most conspicuous defects. It seems certain that they have to some extent remedied the evils for which they were originally designed as a cure, and it is equally certain that their appeal would be strenuously contested by the labor organizations of the country.

*Prescott F. Hall.*

## THE CREATION AND TRANSFER OF SHARES IN INCORPORATED JOINT-STOCK COMPANIES.<sup>1</sup>

THE shares in every incorporated joint-stock company are originally created by the issue of certificates by the corporation. These certificates are issued in performance of a duty imposed by law upon the corporation, and they are issued to persons who have become entitled by law to have that duty performed in their favor, *i. e.*, have become entitled to be shareholders in the corporation. No person, therefore, can possibly become an original shareholder until this duty has been performed in his favor, however clear his right to be such shareholder may be. Moreover, what is thus true of original shareholders is also true of all subsequent shareholders, namely, that a certificate from the corporation can alone make them shareholders; that without a certificate they can have no more than a right to be shareholders. If it be asked why an original shareholder cannot transfer his shares to whom he pleases, the answer is that shares in a joint-stock corporation are creatures of the law, and that the law does not make them transferable by their owners. Accordingly, a certificate of such shares does not run like negotiable paper, either to bearer or to order; nor, like a deed of real estate, to the person named, his heirs and assigns; nor, like an assignment of personal property, to the person named, his executors, administrators, and assigns; but simply declares that the person named is the owner of so many shares.

If it be asked how the corporation, after issuing certificates for all the shares authorized by law, can issue any more certificates, the answer is, first, that any shareholder may surrender his certificate to the corporation, and thus extinguish the shares which it represents, and thereupon he will be entitled to have a new certificate for the same number of shares issued to any person designated by him; secondly, that, when a natural person to whom a certifi-

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<sup>1</sup> The following observations were prepared merely as a part of a lecture on the cases of *Dolder v. Lord Huntingfield*, and *St. Didier v. Lord Huntingfield*, 11 Ves. 283 Cas. in Eq. Pl. 241. It then occurred to the writer that it would be a convenience to the class to have them printed in the HARVARD LAW REVIEW. He did not expect them, however, to occupy a more conspicuous place than among the Notes which follow the leading articles. That they are printed in this place is due entirely to the unsolicited kindness of the Editor.

cate has been issued dies, or an artificial person to whom a certificate has been issued ceases to exist, the shares represented by such certificate become extinguished by operation of law, and thereupon the representative or successor of such person becomes entitled to a new certificate for the same number of shares. Is such representative or successor also entitled to have the new certificate issued, not to himself, but to such other person or persons as he shall designate? In short, can he assign his right to have a new certificate issued? Without undertaking to say that a right to have a duty performed is always assignable, there is no doubt that it is so in many cases. For example, there is no doubt that the right of a legatee to have his legacy paid, or the right of one of the next of kin of a person who has died intestate to receive his distributive share of the personal estate of the latter, is assignable. So a tithe-owner may clearly assign his right to have the tithes set out by the tithe-payer. Indeed, in every case where the owner of property is entitled as such to have some duty performed in respect of such property in order to render his enjoyment of it more perfect and complete, he can of course, by transferring the property, also transfer the right to have the duty performed; and if the right to have a certificate of shares issued does not belong to this category, it is only because the performance of this duty is a condition precedent to the existence of the shares, and so of course to the ownership of them. But the same thing is true of a legacy or a distributive share; for all that the legatee gets from the testator's will is the right to have the duty of paying the legacy performed by the executor, and the performance of that duty is what vests in the legatee the property in the legacy; and, in like manner, all that a next of kin gets from the Statute of Distributions is the right to have the personal property of the intestate divided among the next of kin. So also a tithe-owner does not acquire title to his tenth part until it has been severed from the other nine parts by the tithe-payer, *i. e.*, until the latter has performed the duty of setting out the tithes.

Moreover, when shares in an incorporated joint-stock company are sold, all that the buyer gets from the seller is the right to have the duty of issuing a new certificate in exchange for the old one performed by the corporation. Accordingly, the seller delivers his certificate to the buyer, in order that the latter may be able to perform the condition of surrendering it to the corporation. The seller also delivers to the buyer what purports to be a transfer of



the shares themselves, with a power of attorney to transfer the same on the books of the corporation, but what is in truth only a transfer of the right to have a new certificate issued on the surrender of the old one, and a power of attorney to transfer that right on the books. On the delivery of these two documents to the corporation, the buyer is entitled to a new certificate, and if it be refused, he may file a bill to compel the issue of it.

When a shareholder, being a natural person, dies, or, being an artificial person, ceases to exist, his representative or successor is entitled to a new certificate unconditionally. He is not bound to surrender the old certificate, for that has ceased to be operative; and he is not bound to produce an assignment from the former shareholder, for he has acquired his right by operation of law. Moreover, if he assign his right to receive a new certificate, his assignee is entitled to such certificate on producing the assignment, with a power of attorney to make the assignment on the books. He is not bound to produce and surrender the old certificate, for the reason just stated.

So far, therefore, from there being any doubt as to the assignability of a right to have a new certificate issued, the truth is that it is only by the transfer of such right, either by the act of the shareholder or by operation of law, that the shares themselves can be transferred; and what is called a transfer of shares on the books of the corporation is only a transfer of the right to have a new certificate issued.

It will be seen, therefore, that there is a striking analogy between shares in a corporation and copyhold land; for a title to the latter can be obtained only by grant from the lord of the manor, all of whose grants, moreover, cease upon the death of the grantee, the representative of the latter having no more than a right to call upon the lord for a new grant, and a grantee can transfer his interest only by surrendering it to the lord, and procuring him to grant it anew.

What has been said of shares in corporations is also true in England of stock in the public funds. Therefore, the plaintiff in *St. Didier v. Lord Huntingfield*, as well as the plaintiffs in *Dolder v. Lord Huntingfield*, stated a good case against the Bank of England and the South Sea Company, at least so far as regards the questions above considered; but the relief to which they were respectively entitled was not to have the stock transferred, but to have new certificates issued to themselves. *C. C. Langdell.*

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THE ZOLA TRIAL.—In the year 1894, Alfred Dreyfus, a captain in the French Artillery and attached to the general staff, was found guilty by a court-martial of furnishing secret information concerning French military affairs to a foreign power. In consequence he was degraded before the army and sent to a life imprisonment. The evidence on which he was convicted, so far as was made known to Dreyfus, his counsel or the public, was a memorandum or *bordereau* which announced the transmission of despatches containing the secret information to agents of the foreign power. It came to be believed by many that the real basis of the conviction was another document or documents not revealed to the prisoner or his counsel. In 1896 Colonel Picquart, on strength of a resemblance of handwriting, charged Major Esterhazy with being the author of the *bordereau*. A court-martial was instituted, before which Esterhazy was tried and acquitted. M. Emile Zola, in a letter published in a Paris newspaper, the *Aurore*, discussing these proceedings, stated that the Esterhazy court-martial acquitted the accused by order of General Billot, the Minister of War. On February 7th of this year the trial, before the Assize Court of the Seine, of M. Zola and M. Perreux, the publisher of the *Aurore* for defamation of the court-martial, began on plaint of the Minister of War, under a section of the Press Law covering such a case.

M. Zola undertook to justify his statement on the ground that it was true. The technical and exact issue of the trial was then whether the Esterhazy court-martial acquitted the defendant by order of the Minister of War. But behind this were questions which could hardly fail to arise. Did the Esterhazy court-martial acquit legally? Did the Dreyfus court-martial convict illegally? And back of these questions was one only remotely connected, though unfortunately insisted on by the defendant. Was Dreyfus guilty? It will be seen that the prosecution had, from a legal point of view, a decisive advantage. The issue before the jury was

not the issue intended to be raised. In explanation of this, however, it must be noticed that if M. Zola had not been willing to put himself technically in the wrong by saying rather more than he meant, in all likelihood he would never have been tried, and so would have lost the possibility of doing indirectly what there was no hope of doing directly; that is, bringing to light the methods of the courts-martial.

The court decided that the evidence should be strictly confined to the Esterhazy court-martial, and that the Dreyfus affair should not be touched upon. In carrying out this conceivably proper decision, however, the court were not entirely consistent. The defence were kept well within bounds, it is true, but witnesses for the prosecution were freely permitted to assure the jury that Dreyfus was guilty. In fact this discrimination on the part of the court gave opportunity for the most dramatic incident of the trial which occurred towards its close and turned the tide that was beginning to run in spite of everything in favor of the defendant. The generals, who from the first were allowed to "cast their swords into the scales of justice," executed a brilliant *coup de théâtre*. This was when General de Pellieux announced to the jury that Dreyfus was guilty beyond shadow of a doubt, and that this was amply proved by a document which he had seen; namely, a letter from one foreign military *attaché* to another containing words to this effect: "Do not say anything of our dealings with *cette canaille de D...*" On the following day General de Boisdeffre was allowed to reiterate the testimony of General de Pellieux. When M. Labori, Zola's counsel, rose to question the generals he was forbidden to do so on the ground that the subject-matter of their testimony was outside the scope of the court's inquiry. It should be noted that this document was not shown to be the secret document on which it was claimed that Dreyfus was convicted.

The most striking general features of the case may be summed up in a paragraph. The witnesses told the jury what they knew of the matter, what they had heard about it, and what they thought about it. The manner of giving evidence in many cases can be described only as speech-making. M. Jaurès, and the venerable M. Gremiaux, a professor in the École Polytechnique, harangued the jury in behalf of the defendant; General de Pellieux several times made speeches to the jury of a highly inflammatory character appealing to their patriotism, their generosity, their hopes and their fears. The witnesses usually commented freely on the evidence, drew inferences and argued. General also was the questioning of witnesses by each other. M. Zola too, questioned the witnesses, and made suggestions to the court. There was no case where a witness was compelled to answer. The counsel gave evidence to the jury without varying their character as counsel. Perhaps the most remarkable feature of all was the attitude of the military witnesses. Attending because they were compelled by the court to do so, they answered questions only when they pleased, and though apparently holding themselves above and free from any duty to a civil tribunal, yet dominated the trial and were the most potent factor in it.

It was impossible for the jury to bring in any other verdict than "Guilty." On the technical issue it was a correct result. It is the impression of the writer that the results reached by the courts-martial were just also.

On the other hand it is an almost irresistible conclusion from the report of the Zola trial, that all three trials were illegally conducted even according to French law. This does not leave out of consideration that the first



two tribunals were courts-martial, and that an extraordinary course to a certain degree is proper when state and military secrets are involved. It was abundantly proved in the Zola trial, not by the defence, but by witnesses for the prosecution, that Dreyfus was convicted either on plainly insufficient evidence, namely, the *bordereau*, or on illegal evidence, namely, a secret document not disclosed to himself or his counsel. It was abundantly proved by the same witnesses that the Esterhazy court-martial, out of respect for the *chose jugée* or for other reasons, did not try the accused at all. Until the *Cour de Cassation* has passed on the exceptions taken to the conduct of the Zola trial itself, it may be unwise to say that that too was on its face illegal, but such is the writer's conviction. If it is permitted to point out a conclusion when it appears to be so obvious, it may be said that judging from these trials, the French people either fail to distinguish between a just result legally reached and a just result reached illegally; or if they perceive the distinction, consider it as a matter of indifference. Probably the latter statement is the truer one. The contrast to Anglo-Saxon legal ideas is glaring. Conceivably a neutral party might prefer one idea or the other. The Anglo-Saxon may be pardoned for viewing the comparison with complacency.

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**ARREST ON A BAIL PIECE.** — An ancient right, notable by reason of the infrequency with which it is exercised at the present day, is illustrated in the case of *Von der Ahe's Petition* (reported in the *Pittsburg Commercial Gazette*, Feb. 12, 1898). Von der Ahe was the defendant in an action on a debt in the State of Pennsylvania, and had been admitted to bail. The case went against him, but he had gone into the State of Missouri, and refused either to pay or to give himself up. His bail finding himself liable, took forcible measures to bring the principal to Pennsylvania in order to surrender him. He employed a detective, who arrested Von der Ahe in St. Louis, Mo., and brought him to Pittsburg. Von der Ahe thereupon applied to Judge Buffington of the Federal court for a writ of *habeas corpus*, but the court justified the seizure and remanded the petitioner to the custody of his bail.

The right of a bail to arrest the body of his principal, although at first sight anomalous, is consistent with the early conception of the relationship between the parties. The bail has been looked upon as the principal's gaoler, and the principal when bailed has been deemed as truly imprisoned as if he were still confined by bolts and bars. The bail may discharge himself whenever he pleases by surrender of the principal; to this end he can imprison him, pursue him, arrest him on Sunday or on his way to court in another suit. He can even break into his house to take him; and he may make the arrest either in person or by agent. "The bail have their principal on a string, and may pull the string whenever they please and render him in their discharge." *Anonymous*, 6 Mod. 231. Any liberty, therefore, allowed to the principal is by the indulgence of his bail, and as was said by Lord Hardwicke in *Ex parte Gibbons*, 1 Atk. 237, to "prevent a person who has been so kind as to give the principal his liberty from taking him up in discharge of himself would be very hard."

The authority of a bail over his principal being virtually that of a gaoler over a prisoner, the further question is raised whether this relationship follows the principal beyond the limits of the State where it arises.

The argument was strongly urged in the present case that the arrest was by process of court, and could properly have been made only within the jurisdiction of the court where the original suit was brought and the bail piece issued. This argument, however, is untenable; for the bail piece, unlike a sheriff's writ, is not the authority by which the arrest is made. The relation subsisting between the parties is the authority for the arrest, and the bail piece is merely evidence of that relation. No good reason can be suggested why this relation, like that of master and servant, or husband and wife, should not be maintained in any State or jurisdiction. That it is so maintained has been decided by the United States Supreme Court, and this view is supported by all competent authority. *Taylor v. Taintor*, 16 Wall. 371; *Commonwealth v. Brickett*, 8 Pick. 237.

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RELIGIOUS LIBERTY UNDER THE FEDERAL CONSTITUTION. — Except in the case of *Reynolds v. U. S.*, 98 U. S. 145, where it was held that the Mormons were not constitutionally entitled to practise polygamy, the first clause of the First Amendment to the Constitution of the United States, providing that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," has never been fairly brought up for judicial construction, until a recent case in the Supreme Court of the District of Columbia. In this case, *Bradford v. Roberts* (reported in 26 Wash. Law Rev. 84), the Court restrained the application of public funds to the construction of a building on the grounds of the Providence Hospital in Washington. Congress had appropriated money for a building, to be erected on the grounds of a hospital within the District of Columbia, at the discretion of the commissioners of the District; and the commissioners made an agreement with the directors of this institution, which was under Roman Catholic control, to construct the building on their grounds, to put it under their management, and to pay them for the sick that might be sent there by the District. That this agreement was beyond the authority of the commissioners is made to appear clearly from the appropriating act, which contains a section declaring that it is against the policy of the government to make any appropriation in aid of a sectarian institution. Apart from this express restriction, however, it was held that the agreement was unconstitutional. For this decision no judicial precedent is quoted, nor any authority except two messages of President Madison vetoing acts passed by Congress for the benefit of religious societies, as in conflict with the first Amendment. The first of these acts seems to have amounted to little more than a grant of corporate privileges to a church and the prescription of various regulations as to its management. Congress, however, has frequently incorporated churches and sectarian institutions, nor can any objection be taken to such charters so long as all regulations contained in them are construed as affecting merely the secular affairs of the corporation. There seems to have been no sufficient ground, therefore, for the veto in the case of this act. The second act was simply a grant of land to a church, and presented a case somewhat similar to that of *Bradford v. Roberts*. That the second veto and the decision of this recent case were alike correct seems clear. It may be said that in the case under discussion the money was to be expended not so much for the benefit of the institution as for the benefit of the District whose sick poor people, according to the agreement, were to be



received there. The directors of the institution, however, would certainly acquire an interest in the building, and have possession and control of it, as well as the spending of the money which might be paid by the government for the care of the sick. If this use of public money were allowed, it would form a sufficient precedent for appropriations to any sort of sectarian institution which could be made the instrument of public charity; and such appropriations would very easily afford opportunities for discriminations entirely against the spirit of the Constitutional provision. To connect the administration of public charity with any organization under sectarian control is a step in the direction of an establishment of religion.

What Congress would be restrained from doing under the first Amendment can best be conjectured from a comparison of the numerous cases which have arisen under similar prohibitions in State Constitutions. The language of these Constitutions, though often much more explicit in forbidding aid to sectarian institutions, would not seem to cover any more ground than the general words of the Federal Constitution. As the State courts have almost always been very strict in condemning any sort of State aid to a school or charity under the control of any religious sect, so also it seems likely that the Federal courts, if occasion shall arise, will be strict in applying the prohibitions of the First Amendment.

GIVING A JUDGE THE LIE.—An interesting point in the law of contempt was recently passed upon by the Supreme Court of California in the case of *McClatchy v. Superior Court*, 51 Pac. Rep. 696. While a cause was on trial in the Superior Court, a newspaper in the town published what purported to be the testimony of one of the witnesses. On seeing the article the judge stated from the bench that it was entirely false and a gross fabrication, to which the newspaper, in its afternoon issue of that day, replied that the judge, "a prejudiced and vindictive Czar, . . . knew that the statement made in the *Bee* was essentially correct . . . when he shamelessly and brazenly declared it to be a gross fabrication." On being charged with contempt of court, the editor, at the hearing, desired to introduce witnesses to show that the report of the testimony in the *Bee* was correct. This the judge refused to allow, but permitted the defendant to show that the publications were made without malice. The defendant declined to avail himself of such privilege, and was adjudged guilty of contempt. On *certiorari*, the majority of the Supreme Court held that the refusal to permit defendant to prove the truth of the first publication denied to him his constitutional right to be heard in his own defence. The gravamen of the charge, say the court, was the alleged false character and wrongful intent of the first publication, to which charge proof that the report was true and without malice would constitute a complete defence. Three judges dissented, and their views are expressed in a strong opinion by Harrison, J.

It would seem that the grounds of the dissent were well taken. As Justice Harrison pointed out, it was not the report of the testimony that constituted the offence, but the subsequent publication stating that the judge knowingly lied, and attempting to make him accept the newspaper's version of the testimony. Assuming that version to have been correct, it certainly seems that the language of the second article tended to prejudice the judge as well as the public on the merits of the cause on trial,



reflected on the tribunal, and thus embarrassed the administration of justice. If the newspaper wished to vindicate itself against a false charge, it might perhaps have simply reasserted the truth of its first report, or better yet, have waited for vindication till the trial was over; but to state, during the trial, that the judge knowingly lied was not a justifiable method of defending its reputation. If then the truth of the first publication was irrelevant to the charge, it can hardly be said that the defendant was denied a constitutional right in not being permitted to set up such a defence.

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STATE CONTROL OF INTERSTATE COMMERCE. — The line between the permissible and the unpermissible in State legislation affecting interstate commerce becomes at times vague and indistinct. The fundamental reason for this uncertainty lies in the difference of opinion among authorities as to the interpretation of that clause in the United States Constitution which gives to Congress the power to regulate commerce between States. One view, expressed by Chancellor Kent, and commended by its simplicity, is to the effect that until Congress acts a State may pass any laws it pleases in regard to commerce. This view has not been taken by the Supreme Court; and the contrary doctrine now obtains, that Congress has exclusive power to regulate interstate commerce, and that even when Congress does not act no State can take the power to itself. Practical necessity, however, early compelled a modification of this broad doctrine; and many State laws are supported under the guise of the police power of the State. The limits of this police power have been difficult of definition; and they have been strained or contracted accordingly as the Court has felt more or less strongly the pressure of the doctrine of Chancellor Kent.

In this doubtful condition of the law, the recent case of *Chicago, M. & St. P. Ry. Co. v. Solan*, 18 Sup. Ct. Rep. 289, is interesting. An Iowa statute, providing that no contract shall exempt from the carrier's liability any corporation carrying persons or goods by rail, was applied by an Iowa court to a contract of interstate commerce, the carrier being held to full liability for an accident happening in Iowa. In holding that the statute so applied was not unconstitutional as an attempt to regulate interstate commerce, the Court acts consistently with a line of other decisions which hold that a State may prescribe rules for the construction and regulation of railroads crossing its territory. *Smith v. Alabama*, 124 U. S. 465. Yet these decisions are hardly in accord with the reasoning in certain other cases. The general rule which has been laid down is that matters concerning interstate commerce which demand uniform regulation throughout the nation are beyond the scope of the police power of the State, while matters susceptible of a local treatment are within the scope of that power. This rule, however, has not been followed out with entire consistency. It was strained in putting a limitation of the police power in *Leisy v. Hardin*, 135 U. S. 100; the regulation there in question of sales of liquor brought from one State into another, even in the original package, seems to be a subject more fit for local than for national control; but the State law was held unconstitutional. In the present case, on the other hand, the rule is strained in the opposite direction in favor of the State power. The regulation of the contracts made by carriers engaged in interstate commerce would seem to be a particularly apt subject for a uniform

national law; in fact, in the case of *Hall v. De Cuir*, 95 U. S. 485, the Court declared uniformity in the rules governing carriers to be not only desirable, but necessary. The decision, therefore, is hard to reconcile with the general rule already stated, without modifying the rule in the interest of State laws deemed necessary for the protection of life or property within the State. The rule with its modifications thus forces the principle that Congress has exclusive power over interstate commerce to assume a meaning very different from the obvious one. The conclusion, however, that is reached in the present case is satisfactory; and so far as it is at variance with the principle of the exclusive power of Congress, it indicates a growing feeling in favor of the contrary view.

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VERDICT BY INCOMPETENT JURORS.—The validity of a verdict rendered by a jury some of whose members are incompetent by statutory regulations, has long been the subject of conflicting adjudications in this country. Beginning with the early Maryland case of *Shaw v. Clarke*, 3 H. & McH. 101, it was certainly the prevailing opinion during the first half of this century that if one of the jurors was an alien, or under age, or lacked any other of the statutory requirements, he was a "non-juror," and his presence vitiated the whole panel and the verdict. The statutes were strictly construed, and incompetency absolutely disqualified a juror irrespective of any challenge from either party in the action; for, it was said, it is the duty of the State to put competent jurors in the jury-box, and the parties have a right to presume that the officers of the State will perform their duty. In recent years, however, the tide of authority has turned, and any incompetency of jurors is held to be only cause for challenge. If a party is cognizant of any incompetency and does not challenge, or even if he fails to examine a juror properly, he is held to have waived his right to object to the competency of the jury, and the verdict will not be set aside unless manifestly unjust. To this effect was a recent case decided in the Supreme Court of Iowa, *State v. Pickett*, 73 N. W. Rep. 346.

It is apparent that many considerations of convenience and public policy combine to support this later view. To permit a verdict to be set aside and a new trial granted whenever one of the litigants has failed to examine the jurors, is to waste the time of the court, increase the expenses of the parties and the State, and delay the ends of justice. On principle, too, this view may be supported. To say that there is a duty on the part of the State to put competent jurors in the jury-box, and that the parties may presume such jurors are competent, seems scarcely consistent with the spirit of the statutes which give the parties a right to examine and challenge the panel. If the parties may rely on the jurors being competent, of what significance are the provisions giving a right to challenge? As the Iowa court said, "The State makes no guaranty as to the competency of the jurors, but says to the litigants, 'Examine for yourselves.'" There seems to be no injustice in such a practice. That "a verdict of a jury of deaf-mutes would be valid if defendant failed to exercise his right to challenge," as has been objected, would be scarcely possible, since, by the weight of authority in England and this country, the judge will exercise his discretion and set aside such a verdict as being manifestly unjust.



CONFLICT OF DIVORCE LAWS. — In the case of *In re Stull's Estate*, 39 Alt. Rep. 16, recently decided by the Supreme Court of Pennsylvania, a man was divorced for adultery in Pennsylvania, where a statute forbade his marrying the paramour while his former wife lived. To evade this statute, the parties went to Maryland, and there contracted a marriage valid by the laws of that State; and they then returned to Pennsylvania. On the husband's death, the widow demanded administration of his estate, but the court refused her application. In deciding thus, the court must have taken one of three positions.

In the first place, they may have recognized the marriage as valid in both Pennsylvania and Maryland, but refused to give the widow the benefit of the inheritance laws because of the way the marriage was contracted. This would seem an untenable view, for the statute declares without qualification that wives are entitled to letters of administration. Nor does this seem to be the real ground of the court.

Secondly, the court may have held the parties married in Maryland, but not in Pennsylvania. This would seem to require something in the nature of a divorce to occur when the parties crossed the border. But a statute expressly declaring that such marriages shall become void when the parties enter the State would be necessary to give the return this effect; and the statute in question merely forbids such marriages.

The last position is the one on which the court probably relied; namely, that from the standpoint of a Pennsylvania tribunal there was no marriage in either State. To support this, they say, first, that the marriage was contrary to the statute. The statute, however, is in terms a mere command not to marry, and it seems unreasonable to imply an incapacity to do an act from the fact that it is forbidden. Secondly, they rely on fraud of the statute. But fraud, though punishable, cannot prevent the fact of marriage occurring, nor ought the court on such a ground to disregard a status actually created. Finally, they say that some marriages are so offensive to the community that the court will be justified in refusing to recognize them. As authority, they mention cases of incestuous marriages. But as no civilized State allows these, a refusal to recognize them can lead to no conflict. They also rely on the cases where courts acting under a statute have refused to recognize marriages between near relations, or between whites and negroes. These cases, are, perhaps, unwarranted exceptions to the general rule that marriages recognized valid by the country where solemnized must be recognized everywhere. But they rest, at all events, on the ground that the statute binds the courts to consider these marriages as contrary to the law of nature, wherever solemnized. It seems impossible, however, to say that a marriage such as took place in this case was contrary to the law of nature. To set up the sense of propriety of the community as the standard of validity for foreign marriages, is a long step beyond even these authorities, and would seem to lead to a very undesirable conflict of marriage laws.

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IMPLIED WARRANTY IN SALES OF FOOD. — The American law on this subject is clearly brought out by two recent decisions. In the first, *Hanson v. Hartse*, 73 N. W. Rep. 163 (Minn.), it was held that when a diseased steer was sold to a retail butcher, who relied on personal examination, there was no implied warranty that the animal was fit for food. In the other, *Wiedeman v. Kelly*, 49 N. E. Rep. 210 (Ill.), it was held that when



a retail butcher sold diseased meat to a customer for immediate consumption there was a warranty of wholesomeness, whether the buyer relied on his own judgment or on that of the seller. The fundamental principles on this subject are that when the buyer relies on the judgment of the seller a warranty will be implied, but when he relies on his own judgment it will not. The first case was decided strictly on these principles, and is good law in both England and America. The second, on the other hand, is an instance of the departure by most of our courts from the uniform application of these principles which is the English practice. Our courts say that while the general rule is doubtless as above stated, and applies to the case of sales of food from dealer to dealer, and from private individual to consumer, yet in the case of sales from dealer to consumer there is an exception, and there a warranty will always be implied, no matter whose judgment is relied on. It is hard to find on exactly what ground these decisions rest. The authorities relied on seem for the most part to run back to a statement of Blackstone that a seller of corrupt victuals is liable in deceit, and to some English cases which hold the seller responsible in tort because the act of selling was a statutory crime. Neither of these sources give any support to the idea of a warranty. Accordingly it would seem that the American rule must rest wholly on the uncertain ground that it is necessary to the health of the community. Now in many of the cases which the American rule decides to-day a like result could be reached under the English rule. Though the buyer may, by inspection, tell that the meat is beef and not mutton, it is practically impossible for him to discover the germs of disease, and he must rely wholly on the seller to show him the meat of a healthy animal. In such cases an implied warranty of soundness might well be found without resort to any exceptional doctrines, and notwithstanding the general statement by the courts that in a purchase with inspection the buyer takes the risk of all latent defects. As to those cases where the result reached by the American rule does conflict with the fundamental principle of warranty, it would seem much better for the courts to leave the protection of the public health to the legislature.

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NO INSURANCE AGAINST SUICIDE. — That no recovery could be had on a policy of life insurance, when the insured person had taken his own life, would probably appear to the mind of every layman an evidently sensible conclusion. The legal intellect, as it would seem from two recent cases, is not so easily satisfied. In the case of *Ritter v. Mutual Life Insurance Co.*, 18 Sup. Ct. Rep. 300, the plaintiff's testator insured his life for the benefit of his estate in the defendant company, and afterwards having fallen into hopeless financial embarrassments, deliberately killed himself, with the purpose of securing the discharge of his liabilities by means of the insurance money. The opinion of the whole court, delivered by Mr. Justice Harlan, denies the liability of the company for two reasons. In the first place, they say, the contract was not intended to cover the risk of death by suicide, against which the company would certainly have refused to insure expressly. This method of reasoning, however, is not always safe, for there are many risks undeniably covered by an unqualified policy which the company would refuse to undertake if they were called to its notice and required to be expressly mentioned. It is the fair meaning of the words used, not the particular contingencies which happen to be actu-

ally in the minds of the parties at the time of making the contract, which must determine the liabilities of the defendant. It may be said that suicide is not within the fair meaning of the terms, but certainly it is within the literal meaning, and insurance contracts are strictly construed. Much the better reason for the decision, and one well supported by authority, is that the law will not allow a recovery in consequence of act of self-destruction, whether or not the parties intended that there should be such a recovery. The standard authority on this point is *Fauntleroy's Case* (*Amicable Society, etc. v. Bolland*, 4 Bligh, N. R. 194, 211), where it was held that the insurer was not liable on the death of the insured by the hands of justice. The reasoning of that case is perfectly applicable to this one, and is simply to the effect that the law will not allow an action to be maintained, because to do so would offer to desperate men a temptation or encouragement to commit suicide or do something to get themselves hanged. The reality of this danger is strikingly illustrated by the facts of the present case.

A still more recent case, on the other hand, while noticing the decision above discussed, comes to an opposite conclusion on the strength of a distinction that would seem to be of doubtful validity. The Pennsylvania Supreme Court, in *Morris v. State Mutual Insurance Co.*, 39 Atl. Rep. 52, decided with little discussion that if a life-policy is made payable to a man's wife, instead of his estate, the wife is not prevented from suing for the money by the fact that he killed himself. For this proposition the court quote two New York cases, in both of which the reasoning is extremely brief and unsatisfactory, proceeding apparently on the theory that suicide can prevent recovery only as a breach of an implied condition, which breach not being in this case the act of the plaintiff, the beneficiary, ought not to be a bar to her action. Now if the contract never did, nor could, cover the risk of suicide, no question of conditions is raised, and the identity of the beneficiary makes no difference. Every consideration of public policy would seem to go as strongly against recovery by a wife as against recovery by an executor. A man is at least as likely to kill himself for the benefit of his wife as for the benefit of his creditors.

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ASSIGNMENT OR BILL OF EXCHANGE?—Some legal writers maintain with much spirit that the holder of an uncertified check should be allowed to sue the bank upon which the instrument is drawn, if the bank, having sufficient funds of the drawer in its hands, refuse to pay. Various theories are advanced in support of this proposition; perhaps the view most earnestly insisted upon is that the check operates as an equitable assignment *pro tanto* of the fund against which it is drawn. The late cases of *Niblack v. Park National Bank*, 48 N. E. Rep. 438 (Ill.), and *House v. Kountze*, 43 S. W. Rep. 561 (Tex.), respectively uphold and deny the correctness of this contention.

It is settled law that the relation between a banker and his customer is that of debtor and creditor; and unquestionably the customer may quite as properly assign this claim as any other chose in action which he possesses. But the notion that the assignment may be made by means of a check seems to be founded in a total misconception of the true nature of such an instrument. It is conceived that an uncertified check is in reality nothing but a bill of exchange drawn upon a bank; that it is simply—what it imports on its face to be—an order to pay a certain



sum of money, the obligations of all parties to the instrument, as in the case of an ordinary bill of exchange, being based upon general personal credit. Should an instrument contain words purporting actually to assign the whole or part of a particular fund, it would not be a check at all, but an instrument of an entirely different character. In like manner it would seem that to construe the order contained in a check as an assignment of a particular fund is to deny the very existence of the instrument as a check. In short, it is believed that before certification the only obligation entered into by the bank is with the customer. This contracted obligation is to honor the customer's checks to the amount of his account; and for a breach, the bank, on any sound legal principle, becomes liable to the drawer, and to the drawer only. The holder, however, is clearly not denied an adequate remedy; for until certification the drawer is liable upon his contract to pay the amount of the check in case the banker refuses, and on certification the banker himself enters directly into a contract with the holder.

The question under consideration arises also upon the bankruptcy of the drawer. Were the check-holder really an assignee, he would be allowed, though he had never presented the instrument, to come in as a secured creditor. But, according to the better view, represented by *Dickinson v. Coates*, 79 Mo. 250, the check being regarded as a bill of exchange, the holder is compelled to prove with the general creditors. Again, were the check an assignment, it should have priority over a subsequent attachment or garnishment, though not presented until after service of process upon the debtor. The recent case of *McIntyre v. Farmers' and Merchants' Bank*, 73 N. W. Rep. 233 (Mich.), however, seems clearly right in regarding this position as untenable.

The assignment theory seems to have been adopted in Scotland and in many of the continental countries, but is not law in England or in most of the American jurisdictions. Its validity is distinctly denied in the Negotiable Instruments Law recently enacted in several of the States.

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## RECENT CASES.

**BILLS AND NOTES — INNOCENT ALTERATION — EQUITY JURISDICTION.** — *Held* where the alteration of a promissory note, though made by the holder, is prompted by honest motives, the instrument retains its legal validity, and a bill in equity will lie to recover the amount due thereon. *Wallace v. Tice*, 51 Pac. Rep. 733 (Oreg.).

That the holder of a note which has been innocently altered may restore its original condition and sue thereon at law, is well settled in the United States. *Horst v. Wagner*, 43 Iowa, 373. This being so, the ground for equity jurisdiction is, as the Oregon court admits, doubtful. But see 2 Daniell, Neg. Inst., § 1411. The reason assigned for entertaining the suit is that the aid of equity was necessary for purposes of discovery. But this is no adequate cause for assuming jurisdiction over a legal right which is amply protected at law. *Bispham, Equity*, § 505. Otherwise equity would give relief in every case of a legal cause of action. The notion, however, is quite prevalent in America, and especially where, as in this case, the bill is founded on one of the great heads of equity jurisdiction, as mistake, or fraud.

**BILLS AND NOTES — UNCERTIFIED CHECK — ASSIGNMENT.** — *Held*, that an uncertified check does not constitute an equitable assignment *pro tanto* of the fund against which it is drawn. *McIntyre v. Farmers' and Merchants' Bank*, 73 N. W. Rep. 233 (Mich.). See NOTES.



**CONFLICT OF LAWS — DIVORCE — RE-MARRIAGE.** — A Pennsylvania statute forbids a husband divorced for adultery from marrying the paramour during the life of his former wife. *Held*, a marriage in Maryland to evade this statute is void in Pennsylvania. *In re Stull's Estate*, 39 Atl. Rep. 16 (Pa.). See NOTES.

**CONFLICT OF LAWS — WILLS — RES JUDICATA.** — Testator, domiciled in North Carolina, devised lands situated there and in Connecticut. *Held*, the decision of the North Carolina court that the will worked an equitable conversion of the land was not *res judicata* as to the land situated in Connecticut. *Appeal of Clarke*, 39 Atl. Rep. 155 (Conn.).

A judgment or decree of a foreign court is binding only on that which is within its jurisdiction. *Carpenter v. Strange*, 141 U. S. 316. The State within which the land devised is situated is the only one that has the right and power to declare how the land shall pass under the will. *Robertson v. Pickrell*, 109 U. S. 608. The interpretation of a devise, therefore, is for the courts of that State only, *Staigg v. Atkinson*, 144 Mass. 564, and their decisions can have no extra-territorial effect. *McCartney v. Osburn*, 118 Ill. 403, accord.

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CONTROL BY A STATE.** — Section 1308 of the Code of Iowa, forbidding limitation by contract of a carrier's common-law liability, was applied by an Iowa court to a contract of interstate commerce, the court holding the carrier to full liability for an accident occurring within the State. *Held*, that as so applied the statute is not unconstitutional as an attempt to regulate interstate commerce. *Chicago, M. & St. P. Ry. Co. v. Solan*, 18 Sup. Ct. Rep. 289. See NOTES.

**CONTEMPT OF COURT — DEFENCE OF TRUTH OF PUBLICATION.** — *Held*, that when an editor is charged with contempt of court for contradicting a judge as to the falsity of one of the editor's publications, and is not allowed to prove the truth of such publication, he has been denied the constitutional right to be heard in his own defence. *McClatchy v. Superior Court*, 51 Pac. Rep. 696 (Cal.). See NOTES.

**CONTRACTS — LIFE INSURANCE — SUICIDE.** — The insured party, under a policy of life insurance, committed suicide when of sound mind. *Held*, that there could be no recovery on the policy. *Ritter v. Mutual Life Ins. Co.*, 18 Sup. Ct. Rep. 300. See NOTES.

**CORPORATIONS — RIGHT TO PREFER CREDITORS.** — *Held*, that the assets of an insolvent corporation do not constitute a trust fund for ratable distribution among all its creditors; and hence in the absence of statute such a corporation may prefer a creditor who is not a stockholder. *John V. Farwell Co. v. Sweetser*, 51 Pac. Rep. 1012 (Col.).

This is a well considered case, in accordance with the weight of authority. The cases *contra* seem hardly justifiable, even if the results are commendable on grounds of policy. The policy against corporate as well as against individual preferences should be left to the legislature. Judicial legislation is perhaps justifiable at times. As suggested in 2 Am. Law Reg. & Rev. N. S. 448, the courts under cover of the "trust fund theory" have gone so far in developing the "status" of a stockholder, with attending duties of paying up the capital stock, waiving rights of set-off and preference, etc., that the only reasonable plan is to complete the development by further judicial legislation. The rule in the principal case, however, does not interfere with this development, and a contrary rule would constitute an exception to the idea of a corporation as a legal person having powers similar to those of an individual. The law of corporations has been gradually simplified by the recognition of this idea, and if now the courts turn about and introduce exceptions without the aid of the legislature, confusion would probably result. Cf. 9 HARVARD LAW REVIEW, 481, and 10 HARVARD LAW REVIEW, 248.

**CRIMINAL LAW — EXTRADITION — LOCALITY OF OFFENCES.** — One accused of poisoning resulting in death in Canada, may be extradited, although the poison, if administered at all, was given in New York. *Sternaman v. Peck*, 83 Fed. Rep. 690.

This question was argued on an application for a rehearing; and, doubtless for this reason, was only briefly discussed. Conceding the right of a sovereign to pass laws punishing the causing of death within his territories even where the "mortal blow" was received in a foreign State, and assuming that the Canadian government has exercised this right (although this latter is certainly doubtful), we still have the question whether the alleged offence is within the present extradition treaty with Great Britain. U. S. Stats. at Large, vol. 26, pp. 1508-11. The language of the treaty avoids the difficulty, which has been raised under Art. 4, § 19, of the Federal Constitution, that the accused has never fled from the foreign State. See *Jones v. Leonard*, 50

Iowa, 106. But it applies only to a list of specified offences; and of these murder is the only one under which the offence charged can possibly fall. But the crime of murder at common law was certainly not committed in Canada; and since in a treaty between Great Britain and the United States, technical terms would probably be interpreted in accordance with their common-law signification, it may be doubted whether the accused committed in British territory any extraditable offence. However, the tendency in modern times is towards a liberal construction of such treaties. *Benson v. McMahon*, 127 U. S. 457; 1 Moore on Extradition, § 97.

**EVIDENCE — ADMISSIBILITY — UNLAWFUL OBTAINING.** — *Held*, that the fact that evidence is obtained by an unwarranted and unlawful seizure of defendant's property does not render such evidence inadmissible. *Williams v. State*, 28 S. E. Rep. 624 (Ga.).

The rule adopted in the principal case has not infrequently been attacked, but is everywhere law. 1 Greenleaf on Evidence, § 254 a. However reprehensible may be the conduct of parties securing evidence by unfair or illegal means, the only question before the court is the validity of the evidence presented. *Legatt v. Tollery*, 14 East, 302. If not otherwise objectionable, it cannot be rejected because the means by which it was obtained were questionable. *Com. v. Dana*, 2 Met. 329. Analogous to this is that class of cases where a confession has been obtained by holding out a hope of advantage. Though the confession itself is inadmissible, facts discovered as a result of the confession are admissible. *King v. Warickshall*, Leach, 263.

**EVIDENCE — DECLARATIONS OF INTENTION.** — *Held*, that in an action to set aside a will for undue influence, the declarations of the beneficiary charged with exerting the undue influence are admissible, where the will was in accord with such declarations. *Perrett v. Perrett*, 39 Atl. Rep. 33 (Pa.).

Where intention is a material fact, it may be proved by declarations of the party, where such declarations are not too remote in point of time. *Com. v. Trefethen*, 157 Mass. 180. If, in the principal case, there had been nothing in evidence but the will and the declarations of intention, the relation of the declarations to the issue of undue influence would have been too conjectural to make their admission proper. But there was a large body of evidence tending to show undue influence. Under such circumstances, the corroborative evidence of intention seems rightly admitted. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285.

**EVIDENCE — OPINION — DECLARATIONS TO A PHYSICIAN.** — A physician, testifying as to the physical condition of the plaintiff at a certain date, stated that he based his opinion upon an examination and upon the history he received from the family. *Held*, that his opinion should be entirely excluded, as he could not base it to any extent upon the statements of third parties made to him out of court. *Chicago, etc. R. R. Co. v. Sheldon*, 51 Pac. Rep. 808 (Kan.).

It is well settled that a physician cannot give an opinion based wholly on statements made to him out of court by parties other than the one whose condition is in issue. This is so although such parties are the physicians attending the patient. *Reg. Exp. Test.*, § 47; *Heald v. Thing*, 45 Me. 392. The principal case carries this doctrine to its full extent, and the authorities indicate that it would be followed. *Wetherbee's Ex'rs v. Wetherbee's Heirs*, 38 Vt. 454. It is said that as the declarations of the third parties would not be admissible in any case, an opinion based on such incompetent evidence should be excluded. This reasoning, however, appears to be unsound. The opinion of a physician is admitted because of his experience and skill, and his own judgment and ideas are desired; therefore it does not necessarily follow that his testimony should be rejected because his reasoning is founded upon information which would be incompetent as evidence by itself. *Whitney v. Thacher*, 117 Mass. 523. The doctrine of the principal case appears to be an over-refinement, and would result in excluding practically all testimony as to an internal disease where the patient is unable to explain his own condition.

**INTERNATIONAL LAW — FOREIGN SOVEREIGN — COUNTER-CLAIM.** — A foreign sovereign brought suit in England to restrain defendants from using a fund in their hands in certain ways. Defendants set up a claim for damages. *Held*, that while a sovereign suing in England submits to the jurisdiction for the purposes of allowing discovery in aid of the defendant in his action, he does not submit to what is in its real nature a cross-action. *So. African Rep. v. La Compagnie Franco-Belge, etc.*, [1898] 1 Ch. 190.

This is the first time the point has been decided, but the rule laid down seems sound. A sovereign is not subject to the jurisdiction of another country, even though he is travelling there under an assumed name. *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149. He may consent to the action, or he may himself bring suit. *United States v. Wagner*, L. R. 2 Ch. 582. If he sues, he submits to whatever belongs to that



suit, such as defences of payment, etc., and discovery; otherwise the result would frequently be to give him a right where in reality none existed. *United States v. Prioleau*, 2 H. & M. 559. Before the Judicature Acts in England the matter here set up must have been made the basis of a distinct suit. Under such a rule, defendant could not have sued the sovereign. The change in procedure has wrought no change in substance. There are still two distinct actions, consolidated for convenience into one final judgment. *Dicey, Conflict of Laws*, 213.

**PARTNERSHIP — BANKRUPTCY — DOUBLE PROOF.** — A firm gave a note, signed by it and one of the partners. The firm and the partners became bankrupt. *Held*, the holder is entitled to receive a dividend from the firm assets, and then a dividend from the separate assets, but only on the balance of his claim after deducting the amount of the firm dividend. *Ives v. Mahoney*, 73 N. W. Rep. 720 (Minn.).

The rule prohibiting double proof where the creditor holds the obligation both of the partnership and a partner existed in England, *Ex parte Bevan*, 10 Ves. 107, till abrogated by 32 & 33 Vict. c. 71, § 37. It has always been considered unsound and unjust (Eldon, L. C., in *Ex parte Bevan*, *supra*), and is opposed to the authority in this country, *Parsons on Partnership*, 390, with one exception, *Fayette Nat. Bank v. Kenney*, 79 Ky. 133. As to the amount provable, if a dividend has been already paid by one estate, proof of the balance only will be allowed against the other; but where the dividends are to be simultaneous, it is the better opinion that the proof may be against both estates for the whole. *Matter of Farnum*, 6 Boston L. R. 21; *Ames's Cases on Partnership*, 356.

**PARTNERSHIP — DISSOLUTION WHEN INSOLVENT.** — A firm consisting of three partners dissolved, and one partner conveyed his interest to the other two, who carried on the business. Both the old and the new firms were insolvent at the time of the dissolution, though it does not appear that the partners had knowledge of it. *Held*, for reasons which make such knowledge immaterial, that as to the old firm creditors the dissolution was ineffective, and the assets of the old firm were subject to their claims. *Franklin Sugar-Refining Co. v. Henderson*, 38 Atl. Rep. 991 (Md.).

The decision is sound. *Darby & Co. v. Gilligan*, 33 W. Va. 246. The court relies on the "partners' equity" theory, by which so many courts reach results which are sound from a business point of view. The correctness of the case seems to depend on the mercantile theory of a partnership, which, though not formally recognized by the courts, is often indirectly applied. *Menagh v. Whitwell*, 52 N. Y. 146. The important point in the principal case is that the court makes the question of the validity of the dissolution turn, not on the actual good or bad faith of the partners, but on the fact of insolvency at the time of dissolution. The dissolution was in effect an assignment by the old firm to the new firm; and the new firm being insolvent, its assumption of the old firm's debts was not consideration for the assignment. The assignment, therefore, like a voluntary assignment by an insolvent individual, was invalid. See *contra*, *Howe v. Lawrence*, 9 Cush. 553.

**PARTNERSHIP — REALTY — CONVERSION INTO PERSONALTY.** — Real estate was purchased by a firm. One partner deeded his interest to the other to manage for the firm, and on a dissolution to pay over to the grantor or his representatives such portion as should belong to him. *Held*, as between the partners and their representatives, the deed operated as a conversion of the realty into personalty. *Darrow v. Culkins*, 49 N. E. Rep. 61 (N. Y.).

There is a square difference of opinion whether realty held by a firm is to be treated *ipso facto* as converted into personalty. The American cases, of which the opinion in the principal case approves, holding that there is no such conversion, rest on the partners' equity theory, that the property retains its character unless there is need to sell it to adjust the partners' equities. *Shearer v. Shearer*, 98 Mass. 107. The English cases, opposed to this view, rest on the doctrine that the only interest of the partner in the firm property is his right to the surplus after the assets have been turned into money and the liabilities paid off. *Darby v. Darby*, 3 Drew. 495; *Ames's Cases on Partnership*, 177; *Lindley, Partn.*, 3d ed., 690. But all courts recognize the limitation that the partners can settle the character of the property by agreement. In England they can prevent its conversion into personalty. *Steward v. Blakebury*, L. R. 4 Ch. App. 603. In America they can convert the realty into personalty. *Maddock v. Astbury*, 32 N. J. Eq. 181; *Parsons, Partn.*, §§ 271, 272.

**PERSONS — ALIMONY — IMPRISONMENT FOR DEBT.** — *Held*, that an imprisonment for contempt for a refusal to pay alimony is not in violation of a statute forbidding imprisonment for debt. *State v. King*, 22 So. Rep. 887 (La.).

In some jurisdictions a decree for alimony is regarded as an ordinary debt of record for many purposes. It has been held that such a decree gave the wife a vested right



which could not be forfeited or altered, *Kamp v. Kamp*, 59 N. Y. 212; that a claim for unpaid alimony survived the death of the wife, and could be recovered by her administrator, *Miller v. Clark*, 23 Ind. 370; or could be enforced against the husband's estate after his death, *Knapp v. Knapp*, 134 Mass. 353; that such a claim was within the statute discharging insolvent debtors, *Beach v. Beach*, 29 Hun, 181; and also within the protection of the statute against conveyances in fraud of creditors, *Tyler v. Tyler*, 126 Ill. 525; *Phunkett v. Phunkett*, 114 Ind. 484. Still, the principal case is in accord with the authorities upon the precise question presented. *Ex parte Perkins*, 18 Cal. 64; *Pain v. Pain*, 80 N. C. 325. The duty to pay alimony is not properly a debt. It is not an obligation to pay a definite sum of money at all events, but is a mere personal duty resting upon the husband to provide for the support of his wife. Moreover, a decree of court does not make this obligation a judgment debt, since such decree is afterward subject to alteration and control at the discretion of the court granting it. 2 Bishop, Mar., Div. & Sep. § 829 *et seq.*

**PRACTICE — VERDICT BY INCOMPETENT JURORS.** — In a criminal case, where one of the jurors rendering the verdict was unable to read and write the English language, as required by statute, but defendant, by failure to examine said juror, was ignorant of his incompetency till after verdict, *held*, that defendant had waived his right to challenge. *State v. Pickett*, 73 N. W. Rep. 346 (Iowa). See NOTES.

**PROPERTY — ADVERSE POSSESSION.** — One in adverse possession attempted to buy in the outstanding title. His agent presented him with what appeared to be a deed from the true owner, but the signature had been forged by the agent. *Held*, the attempted purchase did not operate to divest the possession of its adverse character. *Oldig v. Fisk*, 73 N. W. Rep. 661 (Neb.).

A grandfather conveyed land to his grandchild by deed given to the father, who entered and held possession for twenty years after the child had become of age, but concealed the existence of the deed. The child discovering the deed, entered, and the father brought ejectment. *Held*, he had acquired no title by prescription. *Parker v. Salmons*, 28 S. E. Rep. 681 (Ga.).

The essence of adverse possession is that the holder occupies not under but in opposition to the right of the true owner. *Dietrich v. Noel*, 42 Ohio St. 21. By the better opinion, color of title is not necessary, nor even the belief that the claim is well founded in law or in fact. *Alexander v. Pendleton*, 8 Cranch, 462. The test is whether the true owner could have brought an action against the holder during the period. In the first case the question whether the possession was adverse came up squarely, and its decision rests on sound principle and is in accord with the weight of authority. 1 Am. & Eng. Enc. Law, 839. In the second case, although a parent can hold adversely to his child after its majority, *Don v. Lane*, 2 N. J. Law, 397, the father's claim was rightly defeated. Whatever might be the rights of an innocent party holding adversely to an owner who is ignorant of the existence of his title, it is clear that one fraudulently concealing such existence would not be allowed to profit by his own wrong.

**PROPERTY — COVENANT AGAINST INCUMBRANCES — STATUTE OF LIMITATIONS.** — *Held*, the Statute of Limitations does not begin to run on a covenant against incumbrances until the ultimate damage has been suffered. *Seibert v. Bergman*, 44 S. W. Rep. 63 (Tex.).

By the weight of American authority, the covenant against incumbrances is broken, if at all, as soon as made, and therefore does not pass to an assignee. *Greenly v. Wilcocks*, 2 Johns. 1. According to this view, the Statute of Limitations should commence running immediately. But by thus compelling the grantee to sue without waiting for actual damage, he is generally allowed only nominal compensation; and if he is subsequently damaged, hardship will result. Rawle on Covenants, 5th ed., § 188. The English courts, by means of the fiction of a continuing breach, allow this covenant to run with the land until actual damage. *Kingdon v. Nottle*, 4 M. & S. 53. The only English authorities on the question when the period of limitations begins to run are the conflicting opinions of Baron Bramwell and Chief Baron Kelly, in *Spoor v. Green*, L. R. 9 Ex. 99. In all of the American States in which *Kingdon v. Nottle*, *supra*, has met with approval, it is conceived that the Statute would commence running only upon the occurrence of the ultimate damage. *Post v. Campan*, 42 Mich. 90. After the decision in the principal case, it seems to follow *a fortiori* that *Kingdon v. Nottle* must be approved in Texas.

**PROPERTY — FIXTURES — RENEWAL OF LEASE.** — *Held*, that ordinary trade fixtures placed on the premises by the tenant and removable without material injury do not pass to the landlord by the act of renewing the term. *Smusch v. Kohn*, 49 N. Y. Supp. 176 (Sup. Ct., App. Term).

Earlier New York decisions have held the other way where the fixtures are in the nature of large structures or buildings attached directly to the land. *Loughvan v. Ross*, 45 N. Y. 792. The principal case refuses to extend the doctrine to store fixtures, although the weight of authority applies this rule to all fixtures. *Amos & F., Fixtures*, 159; *Watriss v. Cambridge, etc. Bank*, 124 Mass. 571. The principal case states the better view, and sound reasoning would demand that it be extended to all cases. *Herr v. Kingsbury*, 39 Mich. 150. Although technically the acceptance of a new lease is equivalent to a surrender of the premises, the actual possession is never divested, and so long as possession is retained the opportunity of removal should remain. To require the tenant to detach fixtures at the beginning of each new term is to discourage the improvements which it is the policy of the law to foster.

PROPERTY — FRAUDULENT CONVEYANCE — NOTICE BY POSSESSION. — A, being considerably in debt, bought land and had the title made out to B, but entered into possession and occupied the premises himself. Later B mortgaged the property to C, who had no knowledge of A's interest. *Held*, that the mortgage was good against A, whether A's conduct was fraudulent or not. *Alliance Trust Co. v. O'Brien*, 51 Pac. Rep. 640 (Oreg.).

Undoubtedly, as the court says, if A had acted fraudulently C's claim must prevail. This, however, is not on the ground that C was misled by A's improper conduct, as the court puts it, but because A could not enforce any claim even against B, since one who asks relief in equity must come with clean hands. *Bartlett v. Bartlett*, 14 Gray, 277. But the court also says that even if A had acted in good faith, C should be protected as a *bona fide* purchaser, and relies on cases which hold that a vendor who has put on record a deed absolute on its face cannot set up the fact that he continued in possession as notice to a purchaser from his grantee of equities reserved. The authorities are about evenly divided on this point, but there is much to be said in favor of these cases. It may be that the suspicions aroused by continued possession by the vendor would naturally be satisfied by an examination of the records, but this and other arguments in favor of the above cases apply with little or no force to the present case. It is by no means analogous, and the general rule should be applied that possession is at least presumptive notice of right to possession.

PROPERTY — HIGHWAYS — DEDICATION. — *Held*, that where a road is laid out by a county and uninterruptedly used by the public for a period of eleven years, without objection from the owner of the land, an intention to dedicate will be presumed. *Whittaker v. Ferguson*, 51 Pac. Rep. 980 (Utah). See also *Evansville & T. H. R. R. Co. v. State*, 49 N. E. Rep. 2 (Ind.).

In order that the public may acquire a right over land by dedication, it must first be shown that there was an intention on the part of the owner to dedicate his land to public uses. Angell on Highways, § 142. Just what evidence will be deemed sufficient is not entirely clear on the authorities. Mere user, without more, short of the statutory period is probably not sufficient. 3 Kent's Commentaries, 451. On the other hand, a much shorter period is enough, where there are other facts tending to show an intention to dedicate. *Jarvin v. Deane*, 3 Bing. 447, where the time was five years. In the principal case, the user for eleven years, coupled with the apparent abandonment of the land by the owner, and the entire reliance of the public thereon, seems sufficient to sustain the decision. *Cincinnati v. White*, 6 Pet. 431.

PROPERTY — MORTGAGE DEED — ACCEPTANCE. — A mortgage was executed by a debtor to a creditor and delivered to the clerk for registration without the knowledge of the creditor. After it was recorded the creditor accepted it. *Held*, that the mortgage must be postponed to a judgment obtained meanwhile by another creditor. *Evans v. Coleman*, 28 S. E. Rep. 645 (Ga.).

Ever since the famous case of *Thompson v. Leach*, 2 Vent. 198, it has been the settled law in England and in nearly all our States that a deed takes effect upon delivery to a third person for the grantee's use, if ever accepted by him. Either acceptance is presumed from the beneficial nature of the transaction to the grantee or by the better view historically a conveyance by deed is rather unilateral in its nature, passing title upon delivery, subject to defeasance by refusal to accept on the part of the grantee. The court in the principal case rejects this whole doctrine and follows *Welch v. Sackett*, 12 Wis. 243, in holding that a deed is of no effect until accepted. While admitting that acceptance usually relates back, it holds that this cannot be allowed where the rights of a judgment creditor intervene. Notice of the mortgage from the record should make no difference, as it is notice of an incomplete transaction. It is like notice of a deed drawn up, but not yet executed. Granting the court's premises the conclusion seems correct. *Contra* to the principal case are *Buffum v. Green*, 5 N. H. 71, and *Merrills v. Swift*, 18 Conn. 257.



**PROPERTY — QUIT-CLAIM DEED — ESTOPPEL BY RECITALS.** — Two of the three children of a man who was supposed to be dead, quit-claimed the part of his land in question to plaintiff, the third child, each grantor describing himself as one of the three heirs of the father. The latter actually died four years later, and soon after his death the above grantors conveyed the same land by warranty deed to defendant, a purchaser in good faith. *Held*, that plaintiff had the better title. *Hagensack v. Castor*, 73 N. W. Rep. 932 (Neb.).

The case shows how far many courts will go in applying the doctrine of estoppel by deed. There were no covenants whatever in the quit-claim deeds, and all that could be called a recital of an estate conveyed were the words, "being one of the three heirs of G. H. Ohler." Yet in order to apply the doctrine of estoppel the court seized on these words as showing that a fee was intended and understood to be conveyed, and that therefore title ought to pass at once to the grantee as soon as the grantors acquired title by the death of the ancestor, just as if there were a warranty of title. This is applying and extending the doctrine of *Van Rensselaer v. Kearney*, 11 How. 297. See also Rawle on Covenants, 5th ed., §§ 247, 248. As between the parties to a deed the justice of the result is evident, but here a *bona fide* purchaser is cut out. This result, however, is probably due to the unfortunate form of statute in Nebraska, which provides that an after-acquired title shall inure to the grantee in an earlier deed, without protecting a later *bona fide* purchaser from the grantor.

**PROPERTY — STATUTE OF LIMITATIONS — PUBLIC USE.** — A lot had been dedicated by the city of San Francisco for certain public purposes, the fee remaining in the city. Plaintiff remained in possession under a claim of right for the statutory period. *Held*, that he had acquired no title by the Statute of Limitations. *Home for Care of Inebriates v. City and County of San Francisco*, 51 Pac. Rep. 950 (Cal.).

It is a maxim of the common law that lapse of time does not bar a sovereign's rights. The ground of this is that laches cannot be imputed to the sovereign, whose time and attention are engrossed by great public duties. But because of the hardship which often resulted, grants were sometimes presumed where possession had been long and continuous. *Crimes v. Smith*, 12 Co. 4; *Roe v. Ireland*, 11 East, 280. Municipalities are the agents of the State for the purposes of government, and many courts hold that they also are excluded from the operation of the Statute, as in the principal case. *Kopf v. Utter*, 101 Pa. St. 27. But the reason of the maxim does not exist here, for the protection of public rights of this nature is one of the very duties for which municipal corporations are instituted, and officers are appointed for that purpose. While rights of importance may sometimes be lost by holding them within the Statute, such a result is justified by the necessity for the security of titles, — the policy at the base of all Statutes of Limitations. *Wheeling v. Campbell*, 12 W. Va. 36. See Dillon, Mun. Corp., 4th ed., § 675, for his view (approved in a few cases) that while not within the Statute, municipalities may be estopped from disputing title where equity and justice require.

**SALES — IMPLIED WARRANTY.** — When a retail dealer sells meat for immediate consumption, there is an implied warranty of wholesomeness, and the buyer who is injured by eating it may recover damages. *Wiedeman v. Keller*, 49 N. E. Rep. 210 (Ill.). See NOTES.

**SALES — INFRINGEMENT OF PATENT.** — A trader in England ordered goods from a foreign manufacturer in Switzerland to be sent by post to England. The goods were manufactured according to an invention protected by an English patent. *Held*, that the vendor had not made, used, exercised, or verded the invention within the ambit of the patent, and that the patentee had no right of action against the vendor for an infringement of the patent. *Badische Anilin und Soda Fabrik v. Basle Chemical Works*, [1898] A. C. 200.

The case is in line with the better decisions in this country under the liquor laws, and illustrates the same principles. See 11 HARVARD LAW REVIEW, 468.

**TORTS — DUTIES OF LANDOWNERS — CONTRIBUTORY NEGLIGENCE.** — Plaintiff owned a house situated about sixty feet from a railroad track, which house was covered with poplar shingles and had a valley extending from the top toward the roadway. In an action against the railroad for negligently setting fire to the house, *held*, that plaintiff was not guilty of contributory negligence by allowing dry leaves to accumulate in the valley. *Louisville, etc. R. R. Co. v. Malone*, 22 So. Rep. 897 (Ala.).

The authorities are divided upon the general question whether an owner of land adjoining a railroad track is guilty of contributory negligence in case of a fire if he has allowed combustible material to accumulate upon his premises, but the majority support the principal case. *Thompson*, Neg., 163-169. This seems to be the sound view.



*Kellogg v. C. & N. W. R. R. Co.*, 26 Wis. 223. A landowner has the right to use his property in the natural and ordinary way, at least where he does not cause injury to others by so doing. To hold that he is obliged to change the conduct of his affairs on account of the possible negligence of another, would be to encourage carelessness and would often give the negligent proprietor control of the neighborhood. A holder of property in an exposed situation must take his risks from accidental conflagrations, but it is difficult to find in the mere facts of ownership and passive occupation the necessary illegal or negligent act to bar his recovery for the tort of another. *Fero v. Buffalo, etc. R. R. Co.*, 22 N. Y. 209. *Contra, Ohio, etc. R. R. Co. v. Shanefelt*, 47 Ill. 497.

**TORTS — IMPUTED NEGLIGENCE.** — The plaintiff was the conductor of a horse-car. Through the concurring negligence of the driver and the servant of the defendant, the car and the defendant's cart collided and the plaintiff was injured. *Held*, the negligence of the driver was not imputable to the plaintiff. *Hobson v. New York Condensed-Milk Co.*, 49 N. Y. Supp. 209 (Sup. Ct., App. Div., Second Dept.).

When two persons are engaged in a common enterprise and there is a joint management of affairs, there is a mutual responsibility for each other's acts. *Beck v. East River Ferry Co.*, 6 Robt. 82. However, as the jury found that the plaintiff had no control over the driver as to the manner of driving, the present case would not fall within that principle. It seems to be an illustration of the well-settled rule that the negligence of one person is not to be imputed to another merely because both of them are engaged in a common enterprise, when neither has control in fact, or by reason of superior authority over the conduct of the other. *Cray v. Philadelphia, etc. Ry. Co.*, 23 Blatch. 263; *Elyton Land Co. v. Mingea*, 89 Ala. 521. And it makes no difference that the plaintiff and the driver were fellow-servants of the same master, inasmuch as the action was brought against a third person and not against the master. *Galvin v. Mayor*, 112 N. Y. 223.

**TORTS — MENTAL SHOCK — PROXIMATE CAUSE.** — Through the negligence of the defendant an incandescent lamp fell upon the plaintiff, causing a slight bruise upon her temple. She was also frightened and suffered a severe shock which resulted in a miscarriage. *Held*, the plaintiff could recover for the effects of the shock. *Jones v. Brooklyn Heights Ry. Co.*, 48 N. Y. Supp. 914 (Sup. Ct., App. Div., Second Dept.).

Courts have refused to allow recovery where physical damage has resulted from fright caused by negligence, when there was no physical contact. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107; *Spade v. Lynn, etc. Ry. Co.*, 168 Mass. 285; *Kalen v. Terre Haute, etc. Ry. Co.*, 47 N. E. Rep. 694 (Ind.). It has been said there could be no recovery in such a case because the negligence complained of was not the proximate cause of the damage. *Victorian Ry. Com'rs v. Coultas*, L. R. 13 App. Cas. 222. But this doctrine has been much criticised. See 10 HARVARD LAW REVIEW, 387. The true reason for denying recovery under such circumstances probably rests upon the theory that there has been no breach of a legal duty. Courts refuse to recognize a duty because in practice it is impossible to administer any other rule satisfactorily. *Spade v. Lynn, etc. Ry. Co.*, *supra*. There was, however, a breach of a legal duty in the principal case, since there was negligent contact with the plaintiff, and hence mental shock and its effects naturally resulting from that breach should be elements in the damages recovered. See Sedgwick, *Elements of Damages*, 104.

**TORTS — TRESPASS — PLEA OF JUDGMENT AGAINST CO-TRESPASSER.** — *Held*, that a plea in trespass that plaintiff had recovered judgment against a co-trespasser is sufficient without averring satisfaction of the judgment. *Petticolas v. City of Richmond*, 28 S. E. Rep. 566 (Va.).

Although recognizing that the weight of authority in America is *contra*, the court considered itself bound by two Virginia cases decided about a century ago. It also cites the language of the court in *Brinsmead v. Harrison*, L. R. 7 C. P. 552, to show the view of prominent English judges as to the common-law doctrine on the subject. The opinion of Miller, J., in *Lovejoy v. Murray*, 3 Wall. 1, seems to be a complete answer to those English judges. The early Virginia cases were decided before the leading English cases and before *Lovejoy v. Murray*, and although some of the old authorities were discussed, the subject was by no means thoroughly treated. The deference paid to these old cases, therefore, seems to be somewhat extreme. See 3 HARVARD LAW REVIEW, 326-328.

## REVIEWS.

PRINCIPLES OF THE LAW OF CONSENT, with special reference to criminal Law. By Hukm Chand, M.A. Bombay, 1897.

Another work of enormous learning, a valuable contribution to the theory of our law, has come to us from India. The learned author's work on *Res Judicata* was noticed in this magazine about three years ago; we have here a still more thorough and exhaustive study of a special topic. Mr. Chand has brought together vast stores of learning upon the nature and effect of Consent in the Criminal Law, the law of Torts, and the law of Contracts. The English, American, and Indian cases are collected and discussed with patient and intelligent care; the Codes and legal writings of France, Germany, Italy, Spain, and other countries are examined; decisions of the Cour de Cassation and the Reichsgericht are consulted; and even Moham-medan and Hindu law are placed under contribution. A mere bibliography that includes Crivelli's *Concetti Fondamentali* and the Pittsburg Reports, the Indian Law Reports and the Hungarian Penal Code is appalling. Such an assembling of authorities is in itself a work worth the doing.

In dealing with his authorities the author shows an acute and scholarly mind. The material has generally been completely mastered; here and there only the thought is obscured and the discussion confused by the mass of illustrative matter. Mr. Chand has brought out clearly the fundamental difference between the existence and the effect of consent. "Fraud does not negative consent in criminal law; and consent, even if caused by fraud, negatives an offence of which the absence of consent is an essential constituent." He well discriminates consent to pass possession from consent to pass title; and seeming consent extorted by force from real consent under duress. His comments on the important cases, like *Ashwell's* and *Helier's*, are full and sound.

Such a book is of the highest importance both to the student of legal theory and to the practising lawyer. A case like *Ashwell's* cannot now be adequately argued or decided without making use of Mr. Chand's work. It is too late to discuss the law of consent as if all material for the discussion were contained in a few cases analogous to the one in hand. We must recognize that the theory of consent runs through the whole body of the law, and is the same whether the consent is relied upon to excuse a crime or to create a contract. Rules heretofore regarded as unrelated are now seen to be mutually dependent, and are made to contribute each to the other's interpretation.

In this important field which Mr. Chand has made his own — for there is no other adequate treatment of the subject — his book is likely to remain the standard and necessary work.

J. H. B.

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A TREATISE ON THE LAW OF EASEMENTS — By Leonard A. Jones. New York: Baker, Voorhis, & Co. 1898. pp. lxii, 768.

This volume is the most recent of a series of works on subjects connected with the law of real property, in which the author has already published two volumes on Mortgages, and two on the Law of Real Property in Conveyancing. The plan of these works, and the manner in which Mr. Jones has heretofore carried it out, and may be confidently expected to continue to

do so, are well known to the profession. The same systematic arrangement, and practical method of treatment, which characterized former volumes, is consistently adhered to ; while the quotations from authorities and citations of cases are even more ample. The practical nature of the book is seen from the large proportion of its pages which is given to the consideration of rights of way, much the most important kind of easement. The nice theoretical questions, on the other hand, of which there are many in the law of easements, are seldom discussed at length. On vexed points the author scarcely ever gives his own opinion, but cites every possible judicial authority. The very interesting topic of the legalization of private nuisances, which might well be given a distinct place in a treatise on easements, receives slight attention, presumably because few cases in this country have involved the point. In short, the book is made for the working lawyer, and will doubtless be of great assistance to him, especially as there is no other work on the subject approaching this in thoroughness.

R. G.

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PROBATE REPORTS ANNOTATED. By Frank S. Rice. New York: Baker, Voorhis, & Co. Vol. II. 1898. pp. xix, 758.

The present volume is the second in a new series of Probate Reports in continuation of the series known as the "American Probate Reports." It contains about one hundred recent cases of general value decided in the highest courts of the several States on various points of probate law. Mr. Rice's elaborate notes appear to be carefully written, and will no doubt help the lawyer and judge to elucidate some of the difficult problems presented for their consideration.

H. D. H.













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